S. HRG. 101-339

# MINORITY OWNERSHIP OF BROADCAST STATIONS

## HEARING

BEFORE THE

SUBCOMMITTEE ON COMMUNICATIONS

OF THE

## COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION UNITED STATES SENATE

ONE HUNDRED FIRST CONGRESS

FIRST SESSION

ON

MINORITY OWNERSHIP OF BROADCAST STATIONS

SEPTEMBER 15, 1989

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# CONTENTS


| | Page |
|---|---|
| Opening statement by Senator Inouye | 1 |
| Opening statement by the Chairman | 3 |
| Opening statement by Senator Burns | 54 |


## LIST OF WITNESSES


| | |
|---|---|
| Fife, Marilyn, Ph.D., assistant professor, department of radio, TV, and film, Temple University | 136 |
| Huhndorf, Roy, chairman, Cook-Inlet Region Inc | 4 |
| Prepared statement | 6 |
| Letter of October 2, 1989 | 22 |
| Kennard, William E., attorney | 128 |
| Prepared statement | 130 |
| Niekamp, Patricia, president, American Women in Radio and Television, Inc | 34 |
| Prepared statement | 36 |
| Payton, John, attorney | 82 |
| Prepared statement | 86 |
| Porter, Roderick, Deputy Chief, Mass Media Bureau, FCC | 59 |
| Prepared statement | 61 |
| Questions of Senator Burns and the answers | 69 |
| Ramirez, Richard, president, Astroline Communications | 165 |
| Shurberg, Alan, Shurberg Broadcasting of Hartford, Inc | 167 |
| Prepared statement | 170 |
| Smith, J. Clay, Jr., professor of law, Howard University Law School; accompanied by Erroll Brown; Cynthia Mabry; and Lisa Wilson | 138 |
| Prepared statement | 140 |
| Sutton, Percy, chairman, Inner City Broadcasting | 24 |
| Prepared statement | 25 |
| Winston, James L., executive director and general counsel, National Association of Black Owned Broadcasters | 28 |
| Prepared statement | 32 |

# MINORITY OWNERSHIP OF BROADCAST STATIONS

FRIDAY, SEPTEMBER 15, 1989

U.S. SENATE,
COMMITTEE ON COMMERCE, SCIENCE,
AND TRANSPORTATION,
SUBCOMMITTEE ON COMMUNICATIONS,
*Washington, DC.*

The subcommittee met, pursuant to notice, at 10 a.m., in room SD-628, Dirksen Senate Office Building, Hon. Daniel K. Inouye (chairman of the subcommittee) presiding.

Staff member assigned to this hearing: Toni Cook, staff counsel, and Gina Keeney, minority staff counsel.

## OPENING STATEMENT BY SENATOR INOUYE

Senator INOUYE. Ladies and gentlemen, we are here this morning to examine the policies developed by the FCC to increase minority ownership of broadcast stations. This Committee, through its oversight of the FCC, is responsible for ensuring that the goals of the Communications Act are realized. Because minority ownership of broadcast stations was virtually nonexistent prior to the 1970s, minorities throughout the country were in effect denied service directed towards their needs and interests.

Recognizing the importance of ensuring that minorities have the opportunity to air their viewpoints through broadcast outlets, the Commission adopted its minority ownership policy some 15 years ago. Congress has endorsed these policies and I strongly believe we need to continue to enhance the diversity of views and information available over the airways by promoting ownership of broadcast stations by minorities.

In 1974, the D.C. Court of Appeals held that where minority ownership "is likely to increase diversity of content, especially opinion and viewpoint, merit should be awarded." The court concluded that it should be assumed that minority ownership would force the program diversity where there is integration of ownership and management. As a result, the FCC determined that minority ownership should be treated as an enhancement along with local residence, civic participation and broadcast experience when considering applications for new stations in comparative proceedings. In 1978, this policy was extended to include women.

In that same year, the Commission adopted the distressed sale policy. This permits broadcast station owners whose licenses have been designated for revocation or renewal hearings to sell their sta-

tions to a minority-owned or controlled entity at a price substantially below its fair market value.

Finally, also in 1978, to encourage the sale of stations whose licenses have not been challenged, the FCC adopted a tax certificate policy. Under this policy, the FCC used its authority under the tax code to grant tax certificates to licensees who voluntarily sell broadcast stations to minority-owned or minority-controlled entities. The tax certificates permit the seller to defer the gain realized upon the sale.

Since 1978, there have been 38 distressed sales to minorities and 186 stations sold to minorities to receive tax certificates. The percentage of minority-owned stations has increased from less than 1 percent to over 2 percent. Even with this increase, minorities still have a long way to go before the minority ownership of broadcast stations is commensurate with the minority population of this country.

Despite this modest increase in minority ownership under the Reagan Administration, these policies were the subject of a calculated effort by the FCC to eliminate them. The FCC, despite clear congressional desire to increase minority ownership, questioned whether the policies served the public interest. Congressional response was immediate, clear and virtually unanimous. Legislation was enacted instructing the FCC not to take any action to eliminate or undermine the minority ownership policies.

The fight to keep these rules is now going on in another front—the—courts. This spring, the U.S. Court of Appeals for the District of Columbia in two separate decisions struck down the distressed sale policy but upheld the minority preference policy. On March 31st, 1989, the court held in *Shurberg Broadcasting of Hartford, Incorporated v. FCC* that the distressed sale policy unconstitutionally deprives nonminority applicants for broadcast licenses of their equal protection rights under the 5th Amendment, because the program is not merely tailored to remedy past discrimination or to promote program diversity. The court's decision relied heavily on the fact that race is the only factor considered in determining whether the distressed sale policy is applied.

On April 21st of 1989, in another divided opinion, the same court found that the policy of awarding preferences to minorities in comparative proceedings was constitutional. Judge Edwards, writing for the majority in the case of *Winter Park Communication, Inc.* v. *FCC*, found that under the preference policy, minority ownership is the only one of several factors considered, not an unyielding racial quota, and that Congress has expressly approved the minority preference policy.

We now need to turn our attention to addressing the recent court decisions and to strengthen the minority and female ownership policies. We need to demonstrate that minority and female ownership of broadcast stations does, in fact, promote diversity in the views presented on the airwaves. Finally, we need to consider what, if any, changes need to be made in the policies or their implementation to improve their effectiveness.

Before I call upon the witnesses for this morning, I want to take this opportunity to recognize that a strong and wise voice has been silenced, on these and many other matters, with the death of Con-

gressman Leland. During his service in the United States House of Representatives, Congressman Leland could be counted on to speak out in support of less fortunate and the under-represented citizens of this country and the world, and in the area of telecommunications Congressman Leland was instrumental concerning the continuation of the policies we are addressing this morning and ensuring that the public interest was served in this country's telecommunications policy, and I know that all of us will miss Congressman Leland.

I have an opening statement that the Chairman, Senator Hollings would like to have included in the record.

[The statement follows:]

OPENING STATEMENT BY THE CHAIRMAN

I want to congratulate the Chairman of the Subcommittee for holding this important hearing. This matter of minority ownership of the media is one that has been of great concern to both of us. You and I understand the meaning of the media in our society and the need to have a diversity of ownership and programming.

At one time the FCC also shared this goal. In the early 1970's the Commission adopted a policy of awarding preferences to minority applicants for new broadcast stations. The FCC concluded that the promotion of minority ownership of broadcast stations would expand program diversity. In 1978, this policy was extended to include women. That same year, the FCC adopted two other policies designed to promote minority ownership: the distress sale policy and the tax certificate policy. Congress followed up in 1982 by affirming the overall policy with the inclusion, in legislation permitting certain broadcast licenses to be awarded by lottery, a provision designed to promote minority ownership in the lottery statute.

But in the Reagan years, the FCC got on the wrong track. While it used fancy words and phrases to claim these policies were unconstitutional, we knew all along it simply did not support the spirit of these policies. It was for that reason that Congress had to step in by including statutory language to preserve these policies in the fiscal year 1988 Continuing Resolution and the fiscal year 1989 FCC appropriations provisions. Just this week, the State, Justice, Commerce Appropriations Subcommittee included that same language in the FCC's fiscal year 1990 appropriation. This is an indication of Congress' continuing support for these policies.

We have withstood the attack of the Reagan FCC on these policies. Now we need to turn our attention to the recent U.S. Court of Appeals decisions which held the preference policy constitutional, while finding the distress sale policy unconstitutional. We also need to determine how to improve these policies to increase minority ownership and participation in the broadcast media.

I look forward to hearing from our witnesses your thoughts on the future of these policies and what action Congress should take, and your suggestions for improving the effectiveness of the policies.

Senator INOUYE. At this time, I would like to call upon the witnesses we will hear from this morning. The first panel consists of Roy Huhndorf, Chairman of the Cook-Inlet Region, Inc., Percy Sutton, Chairman of the Inner City Broadcasting Company, James Winston, Executive Director and General Counsel, National Association of Black Owned Broadcasters, and Patricia Niekamp, President of the American Women in Radio and Television.

This panel will be followed by the Honorable Robert Porter, Deputy Chief, Mass Media Bureau of the Federal Communications Commission, and the last panel will consist of Mr. John Payton, Esquire, and Mr. William Kennard, Esquire, of the Verner, Liipfert, Bernhard, McPherson & Hand law firm, Dr. Marilyn Fife, Associate Professor of Temple University Department of Radio, Television and Film, J. Clay Smith, Esquire, Professor of Law, Howard University Law School, Richard Ramirez, President of the Astroline Communications Company, and Alan Shurberg, Shurberg

Broadcasting of Hartford, Incorporated, and I thank all of you for joining us this morning for this important hearing.

As I indicated, the first panel of witnesses will be made up of Mr. Huhndorf, Mr. Sutton, Mr. Winston and Miss Niekamp. Mr. Huhndorf has to catch a flight to return to Alaska. That is why we are having the panel first, before we hear from Mr. Porter. Miss Niekamp and gentlemen, I welcome you. Mr. Huhndorf?

**STATEMENT OF ROY HUHNDORF, CHAIRMAN, COOK-INLET REGION INC., ANCHORAGE, AL**

Mr. HUHNDORF. Thank you, Mr. Chairman. My name is Roy Huhndorf, and I am President of Cook-Inlet Region Incorporated, one of the Alaska Native corporations.

I have submitted testimony for the record and for the convenience of the participants I have a summary that I would like to read.

Senator INOUYE. I can assure all of you that your full text will be made part of the record, if it is your desire to summarize your statement.

Mr. HUHNDORF. Thank you, Mr. Chairman.

Cook-Inlet Region Incorporated is one of the 13 regional Alaska Native corporations established under the Alaska Native Claims Settlement Act of 1971.

Alaska Natives, Athabascan, Tlingit and other Indians, Eskimos and Aleuts, are legally and ethnically part of a larger group of Native Americans.

The Alaska Native Claims Settlement Act made land and other resources available to them in recognition of aboriginal Native land rights. CIRI has a legal and moral duty to administer its resources for the benefit of the 6,300 Alaska Native shareholders and their families.

Our shareholders suffer a wide range of serious socioeconomic disadvantages which are traceable in significant part to the continuing effects of past and present discrimination against Alaska Natives.

We distribute one third of our net profits to shareholders for income maintenance and conduct substantial programs designed to promote their vocational training and higher education, as well as the preservation and understanding of culture and history.

In addition, CIRI views its business activities not only as a source of funds with which to carry out its mission but as a potential source of employment opportunities for young Alaska Native shareholders when and as they are ready to compete for these opportunities.

CIRI became interested in entering radio and television ownership in the late 1970s. The opportunities available in Alaska were limited. The companies need to avoid speculative ventures, and it's lack of experience in the field restricted its ability to enter elsewhere.

In 1986, however, a venture in which CIRI was the controlling general partner acquired station WTNH–TV in New Haven, Connecticut. The availability of an FCC tax certificate was critical in allowing us to a winning bid for this station while maintaining

Alaska Native control and without yielding an undue portion of the equity or burdening the venture with an imprudent level of debt.

The tax certificate was likewise critical in our subsequent radio and television acquisitions. It remains a key to the company's future growth in broadcasting and/or cable television.

Our broadcasting operations are conducted through a subsidiary, the board of which is composed of Alaska Natives. The board, which meets at least six times a year, is centrally involved in the selection of station management and the planning of operations. In addition, we are instituting an internship program with the aim of placing Alaska Natives and other minority interns at all of our stations.

We do not seek to dictate programming decisions with a view to ensuring the expression of Native American viewpoints and sensitivity to minority viewpoints generally. However, those whom we entrust with management of our stations know who we are and what we are trying to accomplish. We are pleased in this regard that WTNH–TV was nominated for an Emmy this year for a documentary on race relations in New Haven entitled, "The Price of Prejudice."

CIRI urges legislation to confirm the validity of the FCC minority ownership policies. Barriers to the entry of minorities into radio and television ownership, due in large part to the continuing effects of discrimination, prevent them from making the contribution they would make to the diversity of thought and perspective in the electronic media.

There is compelling national interest in providing a fair chance for them to make that contribution. The tax certificate and the comparative hearing enhancement are narrowly tailored to meet that interest, and the distressed sale procedure can be made so by appropriate modification.

A congressional requirement that the FCC pursue these existing or modified policies would not impose an undue burden on nonminorities. That requirement, however, should be subject to periodic reevaluation.

This concludes my summary, Mr. Chairman.

[The statement and questions and answers follow:]

TESTIMONY OF ROY M. HUHNDORF, PRESIDENT
COOK INLET REGION, INC.
BEFORE THE COMMITTEE ON COMMERCE, SCIENCE
AND TRANSPORTATION

September 15, 1989

Mr. Chairman and Members of the Subcommittee:

I am Roy M. Huhndorf, President and Chief Executive Officer of Cook Inlet Region, Inc. ("CIRI") and Chairman of its broadcast subsidiary, Cook Inlet Communications, Inc. ("CIC"). I am honored to have been invited to present to you our views on the Federal Communications Commission's Minority Ownership Policies, recognizing, of course, the strong support and encouragement Congress has previously shown for those policies.

In my testimony today, I want to describe how our corporations, which are equally and exclusively owned by approximately 6300 Alaska Natives, have been able to enter the ranks of radio and television licensees in this country, the disadvantages and hurdles we have faced as minorities, and the indispensible help that the FCC's Minority Ownership Policies have provided us. I urge that Congress enact legislation aimed at preserving the essence of those policies.

## I. Cook Inlet Region, Alaska Natives and Native Americans

CIRI is one of thirteen regional Alaska Native corporations which Congress established under the Alaska Native Claims Settlement Act ("ANCSA"). You should understand at the outset that Alaska Natives -- Athabascan, Eskimo, Aleut, Tlingit, Haida and others -- are Native Americans in the same sense as Cherokees, Sioux, Apache or Pueblos. They are so treated by federal law.1/ That treatment, moreover, has solid basis. I was appointed by President Reagan and confirmed by the Senate as a trustee of the Institute of American Indian Art, this country's primary institution for the study of Native American culture. I can assure you that, while there are many differences among the cultures of Native American peoples, there are also many common thoughtways, experiences and perspectives.

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1/ The Treaty of Cession (1867), by which the United States purchased Alaska from Russia, entitled the "uncivilized" Alaska Native tribes to the protections of American laws applicable to similar "aboriginal tribes" in the United States. Similar recognition appears in the Organic Act of 1884, the Alaska Native Allotment Act of 1906 (allowing Alaska Indians and Eskimos, and later Aleuts, to acquire land in a manner similar to that afforded other Native Americans), the Citizenship Act of 1923, the Native Townsite Act of 1926, the Indian Reorganization Act of 1934 (as amended in 1936 to equate Alaska Natives with other Native Americans), the Alaska Statehood Act of 1958 (at Section 4), and in the 1971 ANCSA. Moreover, Federal agencies such as the Bureau of Indian Affairs, the Indian Health Service and the Minority Business Development Agency exercise their responsibilities for Alaska Natives as part of their larger responsibilities for Native Americans.

I should add that many Alaska Natives (including a third of the shareholders of Cook Inlet Region) live in other States of the Union. For all these reasons, it is wrong to think of Alaska Natives as exotic residents of the frozen North. We and others like us are all around you. We are the aboriginal owners of this land.

You should also understand that, while the ANCSA was enacted against the background of more than a century of exploitation of, and discrimination against, Alaska Natives, that statute was not an act of reparation for past sins or an effort to overcome the continuing effects of those sins.2/ As its title implies, the ANCSA provided land and other resources to Alaska Natives in payment for legitimate Native property rights.

The resources made available to Cook Inlet Region by the ANCSA are thus a trust which the company has a duty to administer for the benefit and under the control of our 6300 Alaska Native shareholders and their families, a group comprising over 20,000 beneficiaries. Under current law, all of our shareholders must be

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2/ In legislation signed by President Reagan on August 10, 1988, the United States has sought to make reparation to the Aleuts who (along with thousands of Japanese Americans) were interned in "detention" camps during World War II.

Alaska Natives or their descendants; under our charter, only shareholders can serve on our board of directors.

Wise investment of our resources is vitally important to our mission. I do not propose to document for you the history of discrimination against Alaska Natives and Native Americans generally or the extent to which it remains a problem today.3/ Nor would I maintain that every disadvantage suffered by Alaska Natives is the product of past or present discrimination. The heritage of the past, however, does indeed weigh heavily upon our people. Recent findings by the University of Alaska Institute for Social and Economic Research4/ demonstrate, for example that:

1. Alaska Natives are more vulnerable to violent deaths, serious injury, infectious disease and high infant mortality than others in the country. Between 1982 and 1984, Alaska Native suicides were over 5 times the national average,

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3/ It is sufficient to note that Native lands and resources were taken and exploited by the United States or white citizens without recognition of Native rights or compensation, and that many Native groups were subjected to unjustified, punitive military action, not only by Russians, but by the Americans who succeeded them. You can glean some sense of this past from a book such as James Michener's novel, Alaska. Discrimination against Natives, moreover, is clearly not a closed chapter of history. According to the Alaska Human Rights Commission, some 10% of the civil rights enforcement cases brought before it over the past four years were filed by Alaska Natives.

4/ Alaska Federation of Natives, Alaska Natives At Risk (Report, December, 1988).

homicides more than 6 times the national average, and accidental deaths more than 7 times that average. Infant mortalities are 240% of the national average, and incidences of hepatitus B, tuberculosis, meningitis, fetal alcohol syndrome and many other serious diseases far exceed that of the nation as a whole.

2. Most Native Alaskans live in rural communities, but the village Alaskan economy cannot meet the needs of its growing population. As of June, 1988, most Alaskan villages had unemployment rates between one-and-a-half and two times that of the statewide average, and per capita income in rural Alaska was less than 65% that of the average Alaskan.

3. Sadly, our Native children in rural areas enter and exit school with serious educational handicaps. Only 46% of eligible Alaska Natives graduated from high school in 1980 (compared to 88% of Alaskan non-Natives.) The drop-out rate of almost two out of every four students is four times that of the non-Natives. A 1988 study showed that less than 4% of Alaska Natives aged 25 or over had completed a college degree, as compared to 24% of the non-Natives.5/

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5/ Institute of Social and Economic Research, University of Alaska, Minorities in Higher Education (1988).

These conditions are not limited to Natives who live in Alaska. One survey of out-of-state Alaska Natives, taken in 1983, revealed that only 56% had completed a secondary education, and 52% were unemployed or had left the labor force altogether.6/ Nearly one-fourth lived on incomes of less than $5,000 per year, and received some type of governmental assistance. Id.

The shareholders of CIRI suffer from many of the same problems. Their ethnic composition is as follows:

| | |
|---|---|
| Athabascan | 35% |
| Eskimo (Yupik and Inupiat) | 32% |
| Aleut | 18% |
| Other (Tlingit,Haida or mixed) | 15% |

Almost 40% of CIRI shareholders (the great majority of whom are adults and support families) had family incomes below $15,000 last year; roughly 30% did not graduate from high school; the average life span of a CIRI shareholder is 53 years, compared with over 70 years for the average American.

You can understand why, as a matter of corporate policy, we currently distribute about one-third of our net income directly to shareholders for income maintenance purposes. But our aims go well beyond income maintenance. The CIRI Foundation seeks to meet the social and educational needs of shareholders in the Cook Inlet

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6/ 13th Regional Corp., 1983 Survey.

area through college scholarships, vocational training, and career upgrade grants. It also sponsors programs designed to encourage excellence in Alaska Native cultural arts, and to enhance the understanding of Native culture, history and ethnology among Natives and the public at large.

Finally, we view every enterprise in which CIRI is engaged as a potential source of opportunities for our young people to find jobs for which they are qualified and gain experience at all levels of business activity. I want to be very clear on this subject. Having tasted the bitterness of discrimination, we are not about to engage in discrimination ourselves, whether against white majorities or other minorities. Moreover, given the nature of our overall mission, our first priority in employment must be to secure the best qualified people we can find, whatever their race. But as and when our young shareholders are prepared by training and background, we have special reason to ensure their chances to compete for open positions. I am therefore pleased that, in recently opening a Los Angeles office (for the purpose of maintaining closer supervision of our operations in the "lower 49" or -- as Alaskans say -- "the Outside"), we have employed two young Alaska Natives, one as Director of Investments in our lower-49 office and one as Assistant Vice President of a CIRI enterprise in investment management.

## II. Cook Inlet Communications and CIRI's Entry into Radio and Television

From its inception in 1972, CIRI's Board of Directors conceived its task as one of fashioning the company's asset base in a manner that would benefit its Native shareholders. For most of the first decade, we concentrated on confirming and enhancing the company's land and resource base. But the Board also realized that, in addition to providing a strong land base as a birthright for future generations, we had a need to engage in a variety of other business activities. Only in this way could we build opportunities for our shareholders to improve their lives, to create jobs, to change their attitudes towards the world and the world's attitudes toward them.

CIRI first identified communications-related opportunities as a potential field for investment and growth in 1979, when it entered into a joint venture to apply for the cable television franchise in Anchorage. That venture was unsuccessful, but it sparked our interest in the field generally.

We confronted immediately two basic problems. First, Alaska is sparsely populated. There are only nine operating commercial television stations in the entire State, and it has limited ability to support more. Anchorage, Juneau and Fairbanks

-- our major markets (if you can call them "major") -- are too small to be ranked by the ratings services. Cable television opportunities are similarly limited. Currently, 43 systems serve some 70,000 subscribers; all significant franchises have been granted and no new applications are pending.7/ It became quickly apparent that our chances to enter the field lay primarily in other States.

The second problem was a lack of experience. We had capital to invest, but only within the limits of prudence. We could not, and cannot now, risk our resources on speculative ventures. And we lacked a track record in radio or television that would make it easy to attract debt or equity financing for a venture firmly under Alaska Native control -- a feature we have deemed essential. In these circumstances, the FCC's policy on the issuance of tax certificates in support of minority ownership was vitally important. In 1985, we became the controlling general partner and 30% equity owner of the successful bidder for Station WTNH-TV, New Haven, Connecticut, which Capital Cities Communications was divesting en route to its acquisition of ABC. Because of the tax certificate, we were able to make a winning bid, without yielding control or an undue portion of the equity and without burdening the venture with a level of debt beyond our capacity to sustain.

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7/ See 57 Television & Cable Factbook at B-37 (1989).

The tax certificate played a similar role in our acquisition of eleven radio stations from First Media Corporation in 1988, as well as our acquisition of Station WSMV-TV, Nashville, earlier this year. It continues to be a key to any future growth of our activities in radio or television. We are very pleased with the progress of our stations under CIRI control. But we assumed the ownership of our first station (WTNH-TV) only in January, 1986. We have been in this industry for less than three years. We are not viewed, and cannot expect to be viewed, as veteran broadcasters, with a demonstrated record of accomplishment in a field that was highly competitive when we entered and is rapidly becoming much more so.

We have, however, been working hard at the development of the experience and expertise without which no competitive enterprise can be successful, with or without the aid of tax certificates. We operate our stations through limited partnerships in which a CIRI subsidiary, CIC, is the controlling general partner and possesses the exclusive powers of management. All five of the CIC board members are Alaska Native CIRI shareholders. It is a highly active board, which meets regularly six times a year (and more often when needed), which has been centrally involved in the selection of management personnel and which engages in quarterly reviews of budget, programming, news,

and all capital expenditures. While Alaska Natives are still newcomers to the business, we are learning.

I have also referred previously to our efforts to provide employment opportunities for CIRI shareholders and their families. We are now in the process of establishing a far-reaching broadcast internship program for both shareholders and members of other disadvantaged minority groups, under which we would hope to place interns at all of our stations.

That summarizes who we are and what we do in radio and television. We hope to become a company as widely respected in broadcasting as the companies from whom we have purchased the stations we now own. We hope to make a similar mark in the cable television industry. But our hopes and dreams depend in significant part on the continued availability of the tax certificate, as a means of managing and controlling the risks of further investment. Without that means of reducing risk, our duty not to fritter away the patrimony of our shareholders, upon which many of them rely to meet basic human needs, would sharply constrain our ability to expand and grow.

## III. The Need and Justification for Congressional Action

I am not a lawyer, and the sharply differing opinions that judges have recently expressed on affirmative action generally and the FCC's Minority Ownership Policies in particular boggle the minds of most non-lawyers. It is clear, however, that those policies are under serious attack, and I am advised that further Congressional action to endorse and affirm them could play an important role in persuading the courts of their validity.

On that premise, I do indeed urge you to act. I think it obvious that the barriers to the entry and growth of a company such as ours in the radio and television media are, in significant part, due to the continuing effects of discrimination against Native Americans. I think it equally obvious that Native Americans can contribute a very special set of viewpoints and perspectives to those that radio and television convey to the public. For example, special attitudes toward nature and the environment are part of the cultural heritage of all Native Americans, along with an understanding (born of experience) of the need for business enterprises that create long-term employment opportunities, instead of merely extracting the land's resources and moving on. The experience of being subjected to discrimination, moreover, teaches its own special lessons about

the need for sensitivity to the overall problems of race and discrimination in American society.

We bring that heritage with us wherever we go. We do not attempt to dictate the programming judgments of our stations, in an effort to ensure that Native viewpoints are expressed. But those we select to make those judgments know who we are and what it is we are trying to achieve. I am very proud, in this regard, that WTNH-TV was a nominee this year for a television Emmy for its television documentary on race relations in New Haven, entitled "The Price of Prejudice."

For all of these reasons, as well as those advanced by others who are testifying before you today, I suggest that there is a legitimate and compelling national interest in the promotion of minority ownership in radio and television. I understand and agree that the means used to advance that interest must be "narrowly tailored" and must not impinge unduly on the rights of nonminorities. I believe that the Minority Ownership Policies meet those tests.

My central interest, as my testimony makes clear, is in the continued availability of tax certificates. Those certificates do not bar anyone from bidding on a particular station or cable system. They do not immunize us from competition

in bidding for particular properties and they certainly do not protect us from competition in operating those we own. As CIRI has learned from experience, moreover, there are many instances in which the availability of a tax certificate has no real bearing on a seller's choices. The vast majority of broadcast station and cable system sales are made to nonminority purchasers.

Tax certificates, moreover, are only granted when the FCC is satisfied that the purchaser is fully qualified and that the transaction serves the public interest. There is an opportunity for scrutiny to detect and prevent shams. And companies like CIRI, which are genuinely controlled by minorities, have a strong interest in the detection and rejection of shams, against which we otherwise have to compete.

CIRI is less concerned for itself about the continued availability of comparative hearing enhancements or of "distress sale" policies. The comparative hearing procedure requires an investment of executive time and energy that we have preferred to devote to acquisition and operation; the properties available under the "distress sale" policies have been limited in number and have not generally presented the kind of business opportunities we have sought.

For many other would-be minority owners, however, these can be important means of entry into radio and television. We strongly support them, for that reason. The comparative hearing enhancement likewise does not bar anyone from competing for a license. It seems to me fully equivalent to the university-level admissions programs that Justice Powell approved in the Bakke case. I recognize that the "distress sale" policy -- unlike the tax certificate or the comparative hearing enhancement -- has the effect of closing a defined (albeit small) market to any but minority purchasers. That feature, however, can be overcome.

The FCC could, for example, be instructed that, when it designates a broadcast license for hearing on grounds of misconduct, it must consider, not only "distress sales" to minorities, but other sales that are deemed to advance the public interest (such as a sale to an educational institution) or, indeed, other remedies not involving a sale that will serve the need to deter misconduct. That consideration could be accomplished through a consent decree procedure, like that available in antitrust cases.

I recognize, finally, that the Minority Ownership policies should not be "timeless in their ability to affect the future." The barriers to minority participation in radio and television ownership, to which those policies are addressed, were not created in a day or a year and will not yield quickly or

easily. There is no way to predict with any confidence some precise date after which those policies will no longer be needed. But there is plainly a need for periodic review by the Congress, which could be facilitated by mandating surveys and reports by the FCC at intervals of (for example) five years. And the goal is not so elusive or mysterious as to prevent Congress from knowing when it has been achieved.

That goal need not and should not be to obtain minority ownership percentages that mirror the proportions of particular minorities or of all minorities as a whole in the country's population. Even if all the barriers were down, one would not expect any such result. The goal should be, however, to achieve minority ownership on a scale that is more than token -- to give minority-owned enterprises a fair chance to become a significant factor in the radio and television industry as a whole. We cannot legitimately ask for any more. We cannot settle for any less.

COOK INLET REGION, INC.

October 2, 1989

The Honorable Daniel K. Inouye
United States Senate
Washington, D.C. 20510

Dear Senator Inouye:

At the close of the hearing on the FCC minority ownership policies held by the Subcommittee on Communications on September 15, you announced that the hearing record would be held open for sixty days for the submission of additional comments by any interested party. I take this opportunity to respond to the statements about Cook Inlet made in the written statement and oral presentation of Mr. Alan Shurberg.

Mr. Shurberg has submitted the most recent Annual Employment Reports we have filed with the FCC for WTNH-TV, New Haven (which we have owned since January 1986) and WPGC (AM&FM), Morningside, Md. (which we have owned since January 1988), which show the employment of only one part-time Eskimo employee (at WTNH-TV) during pay periods in January 1989. He asserts that neither station broadcasts "programming targeted towards Eskimos," and draws the following conclusions:

(1) that Cook Inlet is "another example of an enterprise set up for the express purpose of taking advantage of opportunities reserved for 'minorities'";

(2) that the lack of "Eskimo programming" at these stations demonstrates "the lack of nexus between 'minority' ownership and 'minority' programming"; and

(3) that, given the lack of "Eskimo presence" in the New Haven and Washington, D.C. areas, FCC policies promoting the ownership of broadcast stations in those areas by Alaska Natives cannot be regarded as "narrowly tailored to remedy the effects of past discrimination."

My testimony describes in some detail who we are and how we became the controlling owners of the New Haven and other stations. The essential facts in that regard have been repeatedly submitted to the FCC in publicly available documents, and I assume that -- had he bothered to learn those facts -- Mr. Shurberg would not have indulged in his assault upon the bona fides of our broadcast ventures. His points about the employment practices and programming of our stations, on the other hand, reflect what I would characterize as an unjustifiably crabbed and narrow view of what the minority ownership policies are all about.

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Mr. Shurberg does not and could not suggest that the New Haven and Morningside stations fail to employ minorities generally (and blacks and Hispanics in particular) at all levels and in substantial proportions. His point is rather that we fail to employ Eskimos. If the suggestion is that there is no Alaska Native "presence" in our operation of the stations, Mr. Shurberg is simply wrong. As my testimony states, all our stations are actively controlled by a board composed entirely of Alaska Natives, to whom those we entrust with management functions are responsible. As my testimony also states, our policy is to promote opportunities for employment in all our enterprises by Alaska Natives, without discrimination against any other group and without any sacrifice in the quality of the personnel we employ. In light of the position from which Alaska Natives generally start (also described in my testimony) and the short period we have been in the broadcast industry, that policy has yet to produce major results at our stations. But we remain committed to the effort (as reflected in, among other things, the internship program my testimony mentions). I would have thought that one with Mr. Shurberg's views would have approved the way in which we are pursuing that effort.

In much the same way, as my testimony stresses, we do not attempt to dictate station programming with a view to expressing Alaska Native (or Native American) viewpoints or to presenting programs designed specially for the small Native American audiences our stations serve. But those who operate our stations know who we are and what we hold important. They know, for example, that we have special concerns for the treatment of the natural environment and for the relations among races in this country -- that we expect them not merely to produce income that can help to support our 6300 Alaska Native shareholders, but to make a contribution to the understanding of such concerns by the audiences they serve. While that knowledge is not the only factor motivating them, it has its effect. As I understand the minority ownership policies, that contribution to the diversity of thought and perspective in radio and television is one of the central results those policies seek to achieve.

Finally, while broadcasting stations and cable television systems are intensely local institutions, they are also intensely involved in a nationwide industry. If we had limited our interest in radio and television to Alaska, our opportunities to enter that industry would have been scant and our chance to have any impact on the industry at large would have been negligible. The minority ownership policies, as I understand them, seek to bring to people across the country the benefits of exposure to the viewpoints and perspectives of minority groups with whom they might otherwise have little or no contact. To limit those policies to the promotion of minority ownership in areas where particular minority groups have suffered discrimination, or where those groups are substantial portions of the population, would not be to engage in "narrow tailoring." It would be to frustrate the achievement of the basic goal.

Sincerely,

COOK INLET REGION, INC.

Roy M. Huhndorf
President

RMH/p01/01

Senator INOUYE. Would you like to wait for questioning until they all finish?

Mr. HUHNDORF. That would be fine with me, Mr. Chairman.

Senator INOUYE. I will call on Mr. Sutton.

## STATEMENT OF PERCY SUTTON, CHAIRMAN, INNER CITY BROADCASTING, NEW YORK CITY

Mr. SUTTON. Thank you, sir. Senator, I am especially pleased to be here on two counts. One, that I am representing my son, Peter Sutton, who is the President of our company and who is on his honeymoon.

Senator INOUYE. Congratulations.

Mr. SUTTON. Secondly, I am a long-time admirer of yours and because of those two things I am here with delight, and there's a third element—I am going to summarize that—which is the content of my statement.

On Tuesday of this week, in New York City, a young man—no, not so young any more, but someone I have known for a long period of time from my community, won a Democratic primary to become the person to seek the mayoralty of the City of New York.

In his acceptance speech—rather, the speech of thanks to his constituents, to his voters and others—he said, I want to thank Mr. Sutton and the WLIB family. Without the WLIB family permitting us to communicate, I could not possibly have won this Democratic primary. WLIB is a daytime radio station.

It is the only daytime radio station in the City of New York. In evaluating where he would place the campaign manager, in evaluating where he would place his advertisements, his commercials, he found that to reach the black community—the African American community, the Negro community—we have had an evolution of names for us—to reach this community that he needed to reach, from which he came, the number one station to reach that community was WLIB, a daytime station.

I come, sir, with much thanks that I was given an opportunity to buy a radio station. I was able to buy a radio station because there was a nice man in the heart of Harlem, where I live, who during the course of a riot in 1964, in appreciation for my conduct and that of some other lawyers in the community, were able to abate some of the consequences of that riot, made a commitment to me to permit me to buy that daytime radio station that had an FM component with it—and FM component that was not utilized.

I went to 67 financial institutions over a period of five years before I was able to find anyone who would believe that I could operate a radio station, and this, sir, despite the fact that I was a practicing lawyer, I had been an Air Force officer, I had been theater sensor for the entire Mediterranean theater during World War II, I had been in the Korean conflict, I had been a staff judge advocate during the Korean conflict after World War II.

In spite of all of those qualifications, it took me visits to 67 institutions, finally acquiring a station only after finding a future president of a bank walking in the rain and picking him up, and having him six months later become president of Chemical Bank. Then I

was able to go back for the third time to Chemical Bank and get the money to buy the first radio station.

The FM side of it became in 1980, 1981 and 1983 the number one rated radio station in America by Arbitron. Not the number one, black, blue, green or yellow, but the number one radio station.

It became good because we had an opportunity to have access and to manage it, and we had loyal listeners. We, today, through WLIB, in walking through the streets of Harlem, through the streets of the City of New York and New Jersey, it is inevitable that if I pass through a crowd of five people, four of them will say, "Thank you, Mr. Sutton. Thank you."

I know that it will be either a thank you for WLIB, or a thank you for the Apollo Theater, but all the other things grow out of WLIB radio.

So my position here today is in support of a policy that will permit priorities for minorities. Why priorities? How can we justify a priority? You mentioned it earlier, sir, and I mentioned it in a different way, as I talk around this country. I am very active in the NAACP and I travel this country speaking for the NAACP. Speaking, hoping to inspire young people, hoping to serve as some measure of a role model.

You said it earlier, that minorities, and specifically minorities who are of African descent, have not had the opportunity. In the past, I remarked upon this as a black tax.

That is, when we buy a radio station now, we must pay much more money. When I sought—when my family sought to buy a radio station in the year 1942, in San Antonio, Texas, nobody would sell them a radio station.

There was a building, sir, in San Antonio, Texas, that we owned, that we could not even collect rent from. We had to have a white person collect the rent. I mention this to say to you that today there is a possibility, if the policy of granting priorities for minorities is actually continued and enhanced, that we are making for is not just enriching black people, African Americans and minorities—and I hope that no minority who gains access to ownership will think that it is access to financial power.

I hope, and I want so much to believe, what we are seeking is access to a better life for all of us, and, sir, we are really looking for someone, some strong voice such as yours, to say, I understand. I understand, because I have heard people say it.

I understand because I live in America and I believe that if ever America is to be America for everybody, then America must reach out to some element of its constituency, of its population, and say yes, things have been bad, but if we can develop an ability on your part to communicate that which is good and report that which is bad, to enhance the lifestyle, then I shall have contributed to this better America.

Sir, we look to you. We believe that you will be that person. Thank you very much.

[The statement follows:]

STATEMENT OF PERCY E. SUTTON

Mr. Chairman and Members of the Subcommittee, thank you for this opportunity to address the very pressing issue of minority ownership of telecommunications fa-

cilities. As Mr. Winston has discussed the impact of the recent court decisions, I will direct my comments to the relationship between minority ownership and diversity of programming.

Within the past year, both the Court of Appeals, in the *Shurberg* decision, and the FCC have questioned the long accepted premise that. "Diversity of ownership equals diversity of programming," *i.e.,* minority ownership will *directly* affect the *image* of minorities projected by the media.

I submit to you that such "reconsiderations" of an obvious truth are merely attempts to justify efforts to retard the perceived growth in influence and ownership enjoyed by Blacks. In a nation with a sorrowful history of racial and ethnic stereotyping, there can be no question as to the impact of controlling one's "image. For what we all sadly realize is that once transmitted, "image" becomes reality.

To illustrate the significance of diverse viewpoints on programming, I'd like to begin with a few excerpts from past media commentary on Blacks and "how they live" . . . .

". . . (T)here are Negroes who shuffle: Negroes who prance: some look like scarecrows, other like fashion plates. Everybody's humming a tune. One and all, they are taking life as they find it, not with oriental apathy or caucasian complaint, but with a cheerful acceptance that bespeaks internal sunshine."

This observation made some 55 years ago is an example of the media's historically negative depiction of Blacks and other minorities, and how such a depiction could shape or reinforce the universal perception of what "those people are *really* like." In all its varying forms, from the weekly newspaper to the daily satellite feed, the communications media has been and continues to be the image maker of western culture. Just this Wednesday in the *Washington Post,* despite all of David Dinkins' many accomplishments and previous public offices held, the story detailing his historic mayoral primary victory in New York began as follows . . . "David Dinkins who used to sell shopping bags on street corners in New York . . ." It takes no great mental leap, therefore, to recognize that the quality of any group's image will be directly affected by the degree to which that group participates in or controls the dissemination of the information upon which these cultural images are based. The "image" is an instrument of social control. The images by which we are perceived determine the behavior of those in power, and, those in power are those in control.

When, in the *Dred Scott* decision, Chief Justice Taney "communicated" that a Black man had no rights that a White man was bound to respect . . . He sincerely thought that he was expressing an obvious truth. When the newspapers covered that story, was there a Black voice/veiwpoint represented to express the other side? *None,* other than Frederick Douglass. The *Dred Scott* decision was a communication that did not shape so much as it reinforced the perception of the "Negro" vis-a-vis the White man of property. The image of the happy smiling "darkie" had already been created through cartoons and cereal boxes and other commercial enterprises of that time, *Dred Scott* merely provided "official recognition."

The excerpt I read to you describing "happy Negroes who didn't reflect oriental apathy" was published just fifty-five years ago in the *Los Angeles Times.* That little piece of cultural imaging was the print media at work. Television has its own shameful history of cultural "contributions"; programs such as "Beulah"; "My Little Margie" (with Willie, the perpetually sleepy janitor); "Jack Benny (with Rochester); "Amos and Andy"; "Good Times", all reflected video impressions that became national perceptions. But who influenced whom? Were these really the impressions that Whites had through contact with Blacks? Or did the media use these stereotypes because they made and make people laugh?

My company, Inner City Broadcasting Corporation has recently renovated and reopened the historic Apollo Theatre. In the 30's and the 40's the Apollo was the place where Blacks could go in Harlem to see the Lena Hornes, Billie Holidays, Willie Smiths and the likes. The Whites saw these people in the Cotton Club, but Blacks weren't allowed there as patrons. Why? Because the "acceptable" image of Blacks at that time were as "exotics". "Jazz", that sexy Black art form, with its sexy Black performers, may have been chic for young Whites, but contact with "non-exotic" Blacks (patrons) was still taboo.

These same artists who were so adored by the patrons at the Cotton Club could only record on "race" labels. There was no Black owned radio at the time, nor were there any Motowns or Apollo labels. The image and thus the perception of Black America that was held by both Black and White Americans from the twenties through the fifties was controlled by what, for Blacks, was an essentially "foreign" press.

When television reflected for over twenty years the misimpression that Blacks didn't really exist in America except as porters, domestics or the unemployed, that

was communications shaping culture. Considering the intensely segregated society which Blacks endured from the twenties through the sixties, there is some mystery as to why we were always portrayed as such "happy-go-lucky" souls. Consider television's shaping of postwar images of "Ozzie and Harriet's" America: Good mothers did not work, and so, of course, *all* Black women on television were domestic workers. Where were their children? From "Sgt. Bilko" through "MASH", the soldier became "at home" in our homes. Were there *no* Black soldiers in the Army? Moving to today's media coverage, why is it the *crime of the century* when a non-Black woman is attacked in Central Park by young Black males, but just another rape when a Black woman is assaulted and thrown from a roof top a few days later? Is it because one woman was a stockbroker and White, the other poor and Black? Why hasn't the national media, with the exception of CBS produced "Sunday Morning," deplored the murder of Yusef Hawkins, and dared to criticize the behavior of certain Bensonhurst residents?

*All of these misconceptions and misinformation from "Beulah" to "Good Times" to Yusef Hawkins to Virginia Beach, were the result of programming in radio and television, and editorial discretion in the newspapers.* But more importantly, these situations graphically illustrate the historic effect of non-participation in the media by Blacks. As Bryant Gumbel's "R.A.C.E." program sadly demonstrated this week, Blacks continue to suffer from the societal perception that they are not a part of the American culture, but rather a thing apart. If we accept the premise that the communications media can influence the generated perception of any issue, individual, or group, then it is clear that we as minority communicators, and you as government officials have an obligation to see that the participation by minorities in all forms and aspects of media is not subject to the whim of whomever occupies the oval office at any particular moment.

I have been associated with the telecommunications industry for over thirty years. Before I founded Inner City Broadcasting Corporation, I was co-owner of *The Amsterdam News*, New York's Black weekly. Despite the proliferation of other more "desirable" avenues of communications, many Blacks still rely upon the printed word. And so I urge the continued support of the Black press, be it the "Afro-American", "The Star", "The Sentinel", "Big Red", "City Sun" or Jet, and Ebony. Why? Because these Black voices are but another facet of our image as communicators.

Inner City Broadcasting Corporation is a minority owned and controlled telecommunications corporation of which I am Chairman. Inner City is comprised principally of six radio stations, WLIB/WBLS-FM in New York; KBFN/KBLX-FM in Berkeley, California; and KSJL/KSAQ-FM in San Antonio, Texas. Through our partnership with Hispanic broadcaster, Emilio Milian, Inner City owns Spanish language station WWFE-AM in Miami, Florida. Through a subsidiary, Inner City is co-owner of the Sheridan Black Network. Through the Apollo Theatre Investor Group Inner City operates the Apollo Theatre and produces the television program "Showtime At The Apollo." Inner City and Motown have just begun a joint venture, Apollo Theatre Records, on which we will feature artists discovered on our "Amateur Nights". Inner City Cable is co-owner of the cable franchise for the southern portion of the Borough of Queens, New York, Queens Inner Unity Cable, and is the venture partner with Warner Cable and Unity Cable in that system's operation and management.

As an active broadcaster, I fully subscribe to the premise that diversity of ownership will bring about diversity in programming. Both WWFE in Miami and Black news and talk station WLIB in New York are programmed to be "Community Voices", in our continuing efforts to positively re-shape the images of the minority community. A recent poll conducted for *New York Newsday* by the Gallup Organization found that nearly 7 out of 10 Black New Yorkers surveyed said that they look to WLIB, its sister station WBLS(FM) and the City's leading Black weeklies as a source of news. Even more impressive, one quarter of those questioned said they rely on Black-owned radio and publications as their most important news source!

I *believe* in the *intent* of the minority ownership policy and urge all of you that are so inclined to become telecommunications entrepreneurs—it is a realizable goal. However, I am a realist. I recognize that even if minorities were in a financial position to purchase 4000 of the 8000 radio stations in America, and half of the nearly 600 television stations, the media still would not be owned or controlled by Blacks. It is therefore critically important that the Congress maintains its thrust to push the giant telecommunications companies to employ Black and other minorities in the management track positions. Major corporations in the U.S. still under employ minorities. In the age of data and information services, a telecommunications career is often listed as most attractive to college graduates. However, this "allure" does not translate into jobs. Persons such as myself, organizations such as NABOB, The

Urban League, Operation PUSH must all be vigilant in our efforts to guarantee employment for our graduates in specialty areas.

The current lack of minority presence in telecommunications management is not attributable to the fact that there are no qualified Blacks, Hispanics, or Asians. The requisites of education, aptitude, work experience and dedication are common throughout our community. No, it is not objective characteristics that affect the ascendancy of minorities in telecommunications, rather, it is analogous to the very insightful complaint posed by the two male bastions of civility in "My Fair Lady", who lamented, when considering the difficulty of their efforts to transform the "Pygmalion", Eliza:

"Oh why can't a woman be more like a man? . . ."

I submit that with a bit of literary license we can capture the essence of the minority management dilemma, thusly:

"Oh why can't minorities be more like majorities?"

Once again minorities are the victims of "impressions." *The major obstacle to the elevation and increase of minorities in the ranks of broadcast industry management is the difficulty most "majority" managers face in accepting into their ranks personnel who are not exactly "like them".*

I return to your theme of minority ownership and its effect upon programming and my position that its all about the power of images. Our job as communicators is to ensure that all Americans have access to fair presentation in the media. We must participate to the extent that we control our own images and whatever we then project will be the image—and perceived as such. We can program for cable, we can program for television, for DBS, for the film industry. We can do it all. We have the talent. We can own the media because we have within our communities the financial and political clout as well as the expertise. But we can't participate if no one is willing to sell. And, unfortunately, even as we enter the 1990's, the majority community often still requires an "inducement" to "do the right thing" when the Black community is involved. The Tax Certificate, The Distress Sale Policy, and Comparative Preferences are "carrots" that have worked. But I cannot understand the efforts of those who seek to destroy these policies. Why the need to jealously guard the door against "insurgents" whom you outnumber 9000 to 200?

Inner City Broadcasting was established over 15 years ago with no more than 62 minority investors, all of whom are still stockholders today. The negative image of Black people that America has received in the past was not the most disturbing aspect of the world of communications before we entered it; the most disturbing aspect is that the negative image was the only image shown.

It has been a privilege for me to speak this morning before your Committee, and to participate as the representative of an organization and the owner of a company comprised of "Negroes who do not shuffle, prance, or ask cheerful acceptance."

I thank you.

Senator INOUYE. Well, thank you very much, Mr. Sutton. We will try our best, sir. Mr. Winston?

## STATEMENT OF JAMES L. WINSTON, EXECUTIVE DIRECTOR AND GENERAL COUNSEL, NATIONAL ASSOCIATION OF BLACK OWNED BROADCASTERS

Mr. WINSTON. Well, certainly, I would like to point out that it is a pleasure to be here this morning, Mr. Chairman. I want to thank you for the opportunity to present testimony before this Subcommittee. It is also a pleasure to be here with Mr. Sutton, because you can see he is a very eloquent spokesman for our interests.

I would like to join you in your comments concerning Congressman Mickey Leland. He was a very close friend to all of us, and as you said a real champion of issues of concern to minorities across the world.

One more point I would like to make is, we are NABOB. We are in town for our 13th Annual Fall Broadcast Management Conference, and there are a number of our members who are here in the room with us today.

We will have to be getting back over to the hotel where the conference is going on probably before the hearing is over, so if you see a large mass exodus of black persons in the middle of the hearing, please do not misinterpret it.

And NABOB is the first and only trade association organized to promote ownership of broadcast facilities by African-Americans and to improve the business climate in which these stations operate. NABOB developed in response to the need among African-American station owners for advocacy regarding discriminatory sales and financing practices.

I think you have heard very eloquently from Mr. Sutton just one example of those kinds of financing practices we have had to encounter.

These practices made it very difficult for African-American owners to acquire stations, and discriminatory advertising audience measurement practices have made it difficult to be financially successful after acquiring a station.

When NABOB was founded in 1976, there were approximately 30 African-American-owned commercial radio stations and no African-American-owned television stations. I think that is a misprint in my testimony. I think there was actually one at that time.

Today there are approximately 160 African-American-owned radio stations and approximately 15 commercial television stations. This growth is directly attributable to the FCC's minority ownership policies.

These numbers alone make a strong argument for retaining and codifying the minority ownership policies. However, there are additional public interest considerations, which underscore the importance of retaining and strengthening these policies.

One of the unfounded attacks on the minority ownership policies has been that there is no evidence of a nexus between minority ownership and minority programming. However, in June 1988, the Congressional Research Service of the Library of Congress published its study, which demonstrated that minority-owned stations program more minority programming than stations owned by nonminorities.

Thus, underserved minority audiences directly benefit from minority ownership policies.

In addition, as the FCC recognized when it issued the 1978 policy statement on minority ownership, by providing access to the airwaves to minorities, the entire community, not just the minority community, benefits from hearing the views of otherwise voiceless minorities.

Thus, the minority ownership policies are providing an important national benefit. Moreover, within the group of minority ownership policies, there is a definite order of priority among the policies, with respect to their relative importance.

The primary source of the growth in minority ownership of broadcast stations has been by far directly tied to tax certificate policy. The tax certificate policy is an ingenious policy which creates a win-win situation. By voluntarily choosing to sell to a minority, a station owner may defer the capital gains tax on the station sale.

Therefore, it is an advantage to a station seller to first determine if a minority buyer is available to purchase his station before offering it for sale to the general public.

However, the seller is not penalized or in any way inhibited from selling to a non-minority at any time. And the seller has no obligation to offer his station for sale to a minority. Thus, the policy imposes no burden on station sellers.

On the other hand, the tax certificate provides the minority purchaser with a unique attribute which might cause prospective station sellers to look favorably upon selling to him in the first instance.

The importance of this factor was highlighted in the FCC's 1977 Minority Task Force Report, which led to the creation of the tax certificate policy. The report explained that prospective minority buyers were often never informed when desirable stations were for sale. Instead, these stations were traded within an old-boy network. Only if a station had been on the market for months or even years with no buyers were minorities sought out as the buyers of last resort.

Now, when a sophisticated seller is contemplating a sizeable capital gain tax liability, he might first look to a minority buyer before contacting the old-boy network.

Of course, even with the tax certificate policy in place, many desirable stations continue to trade hands without being offered to minority purchasers. But it is clear that, without this policy, the station trading marketplace would revert completely to its old ways.

Indeed, it has been said that if the tax certificate policy is ever eliminated, minority purchasers might as well disconnect their telephones, because they will never get another call to purchase a station.

Following behind the tax certificate in importance for the growth of minority ownership of broadcast facilities is the enhancement credit in comparative hearings. As the U.S. Court of Appeals has made clear in the Winter Park and West Michigan cases, the use of minority ownership as an enhancement factor, considered among many others in FCC comparative hearings, is constitutional.

As a result of this policy, many minority applicants have been able to obtain construction permits for new stations in markets where the price to purchase an existing station would have been prohibitive.

Indeed, for most new minority entrants, the comparative hearing route is the only route to ownership within their financial reach.

The distress sale policy, even before it was recently declared unconstitutional by the U.S. Court of Appeals in the Shurberg case, was the least used of the three minority ownership policies. This lack of use resulted from two principal factors. First, the FCC substantially deregulated the broadcast industry beginning in 1981. Secondly, the FCC, beginning in 1981, was opposed to enforcing the distress sale policy.

Therefore, in several instances, such as the Spanish International and RKO cases, where the distress sale policy was the only policy in place for allowing those licensees to sell their stations, the

commission concocted ad hoc policies applicable only to those cases, to allow sale of those stations to non-minorities.

In spite of these limitations, however, it is clear that the growth of minority ownership of broadcast facilities over the past decade has been directly due to the existence of these three policies. If we expect to see even this modest growth continue, these policies must be retained.

Moreover, it is also clear that the polices must be codified as part of the Communications Act. The attacks on these policies, led by several members of the FCC over the past eight years, demonstrate that protection of these policies cannot be left solely in the hands of the FCC.

Also, the attack on these policies by the court in the Shurberg case and the dissent in the Winter Park case, demonstrate that only Congress can protect these policies.

Thus, the issue before the committee should not be whether the minority ownership policy should be codified, but rather, what steps should be taken in the codification of these policies, which will insulate them from constitutional attack.

In looking at the majority opinions in Shurberg and the dissent in Winter Park, there are two principal arguments raised by the opponents of the minority ownership policies. These arguments are that the FCC has not demonstrated that there is a nexus between minority ownership and minority programming and that the FCC has not demonstrated that there is a history of racial discrimination requiring the specific remedial measures contained in the minority ownership policies.

However, the opinions in both cases recognize that, if Congress develops a factual record on these issues and then codifies these policies, they will be able to withstand constitutional challenge.

Therefore, NABOB asks, Mr. Chairman, that the committee use its resources and those of the Congressional Research Service to develop the full record needed to protect these policies.

The June 1988 Congressional Research Service study has already developed a substantial portion of that record. Our NABOB member stations are ready, willing and able to contribute additional information about their specific programming practices and specific instances of discrimination.

Our members can provide extensive information concerning experiences in which lending institutions have discriminated against them when seeking financing, either by outright refusal to lend funds or by imposing onerous lending terms, such as requiring cosigners, where such requirements were not imposed on non-minority borrowers.

Similarly, our members can also provide extensive information concerning discrimination by advertisers and advertising agencies, which have categorically refused to advertise on African-American-owned stations.

If the committee lends it name and resources to lead this effort, we are confident that the record which will be developed will give codification of the policies the kind of firm foundation which will make the policies immune from attack.

We at NABOB eagerly look forward to working with you,Mr. Chairman, the other members of the committee, and your staff, in this endeavor.

Thank you very much.

[The statement follows:]

STATEMENT OF JAMES L. WINSTON, EXECUTIVE DIRECTOR AND GENERAL COUNSEL OF THE NATIONAL ASSOCIATION OF BLACK OWNED BROADCASTERS

Mr. Chairman and Members of the Subcommittee, thank you very much for the opportunity to present testimomy before the Subcommittee.

NABOB is the first and only trade association organized to promote ownership of broadcast facilities by African Americans and to improve the business climate in which these stations operate. NABOB developed in response to the need among African-American station owners for advocacy regarding discriminatory sales and financing practices, which made it very difficult for African American owners to acquire stations, and discriminatory advertising and audience measurement practices, which made it difficult to be financially successful after acquiring a station.

When NABOB was founded in 1976 there were approximately 30 African American owned commercial radio stations and no African owned TV stations. Today there are 160 African American owned radio stations and 15 television stations. This growth is directly attributable to the FCC's minority ownership policies.

Before we discuss the future of the FCC's minority ownership policies, it is worth taking a minute to put these policies into historical perspective. In 1974, in *TV9* v. *FCC*, the U.S. Court of Appeals held that, in comparative hearings for new stations, the FCC has an affirmative obligation to consider the minority racial status of an applicant as an enhancement to its application. This, marked a shift from forty years of ignorance and indifference, if not outright hostility, to the concerns of minorities in the FCC's policy decisions, and brought the FCC into an "age of discovery" concerning minorities.

Then in 1976, with the election of Jimmy Carter as President, the FCC moved from discovery to an "age of enlightment." The FCC, under the Chairmanship of Charles Ferris, searched for ways to not only remove barriers to entry for minority owners, but also to affirmatively facilitate entry into ownership by minorities. From this search came the 1978 Policy Statement on Minority Ownership which added the tax certificate policy and distress sale policy to the FCC's already existing minority enhancement credit policy in comparative hearings. With the adoption of the Policy Statement on Minority Ownership, the Commission moved from the age of enlightenment to the "golden age" of minority ownership. As a result, by 1981, the number of African American owned broadcast stations had grown to 141 radio stations and 7 television stations.

However, the "golden age" lasted only briefly. By 1981 the Reagan Administration had taken over the FCC and, under the Chairmanship of Mark Fowler, the FCC began a concerted attack upon the minority ownership policies. Thus, today we find that growth of African American owned stations has slowed greatly. Eight years after the Reagan Administration took office there are only 160 radio stations and 15 television stations. Given the doubling of African American owned stations which occurred in the five years from 1976 to 1981, this modest growth in the past eight years is not encouraging.

These numbers alone make a strong argument for retaining and codifying the minority ownership policies. However, there are additional public interest considerations which underscore the importance of retaining and strengthening these policies.

One of the unfounded attacks on the minority ownership policies has been that there is no evidence of a "nexus" between minority ownership and minority programming. However, in June 1988, the Congressional Research Service of the Library of Congress published its study which demonstrated that minority owned stations program more minority programming than stations owned by non-minorities. Thus, underserved minority audiences directly benefit from the minority ownership policies.

In addition, as the FCC recognized when it issued the 1978 Policy Statement on minority Ownership, by providing access to the airways by minorities, the entire community, not just the minority community, benefits from hearing the views of otherwise voiceless minorities.

Thus, the minority ownership policies are providing an important national benefit. Moreover, within the group of minority ownership policies, there is a definite

order of priority among the policies with respect to their relative importance. The primary source of the growth in minority ownership of broadcast station has been, by far, directly tied to the tax certificate policy. The tax certificate policy is an ingenious policy which creates a win-win situation. By voluntarily choosing to sell to a minority a station owner may defer the capital gains tax on the station sale. Therefore, it is an advantage to a station seller to first determine if a minority buyer is available to purchase his station, before offering it for sale to the general public. However, the seller is not penalized or in any way inhibited from selling to a nonminority at any time, and the seller has no obligation to offer his station for sale to a minority. Thus, the policy imposes no burden on station sellers.

On the other hand, the tax certificate provides the minority purchaser with a unique attribute which might cause prospective station sellers to look favorably upon selling to him in the first instance. The importance of this factor was highlighted in the FCC's 1977 Minority Task Force Report which led to the creation of the tax certificate policy. The report explained that prospective minority buyers were often never informed when desirable stations were for sale. Instead, these stations were traded within an "old-boy network." Only if a station had been on the market for months or even years with no buyers were minorities sought out as the buyers of last resort.

Now, when a sophisticated seller is contemplating a sizable capital gain tax liability, he might first look to a minority buyer before contacting the "old boy network." Of course, even with the tax certificate policy in place, many desirable stations continue to trade hands without being offered to minority purchasers. But, it is clear that without this policy in place, the station trading marketplace would revert completely to its old ways. Indeed, it has been said that, if the tax certificate policy is ever eliminated, minority purchasers might as well disconnect their telephones, because they will never get another call to purchase a station!

Following behind the tax certificate in importance for the growth of minority ownership of broadcast facilities is the enhancement credit in comparative hearings. As the U.S. Court of Appeals has made clear in the *Winter Park* and *West Michigan* cases the use of minority ownership as one enhancement factor, considered among many others in FCC comparative hearings, is constitutional. As a result of this policy, many minority applicants have been able to obtain construction permits for new stations in markets where the price to purchase an existing station would have been prohibitive. Indeed, for most new minority entrants, the comparative hearing route is the only route to ownership within their financial reach.

The distress sale policy, even before it was recently declared unconstitutional by the U.S. Court of Appeals in the *Shurberg* case, was the least used of the three minority ownership policies. This lack of use resulted from two principal factors. First, the FCC substantially deregulated the broadcast industry beginning in 1981. Second, the FCC, beginning in 1981, was opposed to enforcing the distress sale policy. Therefore, in several instances, such as the Spanish International and RKO cases, where the distress sale policy was the only policy in place for allowing those licensees to sell their stations, the Commission concocted ad hoc policies, applicable only to those cases, to allow sale of those stations to nonminorities.

In spite of these limitations however, it is clear that the growth of minority ownership of broadcast facilities over the past decade has been directly due to the existence of these three policies. If we expect to see even this modest growth continue, these policies must be retained.

Moreover, it is also clear that the policies must be codified as part of the Communications Act. The attacks on these policies led by several members of the FCC over the past eight years, demonstrate that protection of these policies cannot be left solely in the hands of the FCC. Also, the attack on these policies by the court in the *Shurberg* case and the dissent in the *Winter Park* case, demonstrate that only Congress can protect these policies.

Thus, the issue before the Committee should not be whether the minority ownership policies should be codified, but rather, what steps should be taken in the codification of these policies which will insulate them from constitutional attack.

Looking at the majority opinions in *Shurberg* and the dissent in *Winter Park*, there are two principal arguments raised by the opponents of the minority ownership policies. These arguments are that the FCC has not demonstrated that there is a nexus between minority ownership and minority programming, and that the FCC has not demonstrated that there is a history of racial discrimination requiring the specific remedial measures contained in the minority ownership policies. However, the opinions in both cases recognize that, if Congress develops a factual record on these issues and then codifies these policies, they will be able to withstand constitutional challenge.

Therefore, NABOB asks Mr. Chairman that the Committee use its resources and those of the Congressional Research Service to develop the full record needed to protect these policies. The June 1988 Congressional Research Service study has already developed a substantial portion of that record. Our NABOB member stations are ready, willing and able to contribute additional information about their specific programming practices and specific instances of discrimination. Our members can provide extensive information concerning experiences in which lending institutions have discriminated against them when seeking financing, either by outright refusal to lend funds or by imposing onerous lending terms, such as requiring co-signers where such requirements were not imposed on non-minority borrowers. Similarly, our members can also provide extensive information concerning discrimination by advertisers and advertising agencies which have categorically refused to advertise on African American owned stations. If the Committee lends its name and resources to lead this effort, we are confident that the record which will be developed will give codification of the policies the kind of firm foundation which will make the policies immune from attack. We at NABOB eagerly look forward to working with you, Mr. Chairman, the other members of the Committee, and your staff, in this endeavor. Thank you.

Senator INOUYE. Thank you very much, Mr. Winston.

Ms. Niekamp.

## STATEMENT OF PATRICIA NIEKAMP, PRESIDENT, AMERICAN WOMEN IN RADIO AND TELEVISION, INC.

Ms. NIEKAMP. Good morning.

As well as being the national president of American Women in Radio and Television, I am also the general sales manager at a VHF television station in Minnesota, a position I reached after 16 years in the broadcasting industry, where I came up through the ranks.

During these years, I was assisted by the FCC's policies promoting affirmative action by broadcasters, which allowed me to get my foot in the door.

American Women in Radio and Television is a non-profit organization composed of several thousand professionals working in the electronic media and closely allied fields.

Among the objectives of AWRT are the advancement of women in the broadcast industry and related areas, and the improvement of the quality of radio and television. AWRT appreciates this opportunity to provide comments on the FCC's policies to encourage ownership by minorities and women.

For many years, AWRT has filed comments in FCC rule-making proceedings and amicus curiae briefs in court cases expressing its view in this area.

Recently, AWRT filed a petition for immediate termination of the FCC lottery rule making proceeding as being in violation of the congressional appropriations legislation. In addition, we filed comments opposing the replacement of the comparative hearing process with a lottery.

AWRT submits that the FCC's uncertainty as to whether there is a nexus between ownership and diversity of viewpoint is belied by the statistics it collected in 1987. The FCC sent questionnaires to 11,000 radio and television stations and collected data from nearly 9,000.

While the FCC itself did not analyze the data, it has been analyzed by the Congressional Research Service, as Mr. Winston referred to. The CRS study concluded that there is a strong indication that ownership of broadcast facilities by minorities and women

results in a greater degree of minority, women's and other audience-targeted programming.

AWRT's own experience in conducting its annual commendation awards program buttresses the congressional findings. AWRT's commendation awards honor radio, television and cable programs, advertisements, news and features, which portray women in a positive and realistic manner, as well as dealing with issues of concern to women.

When we studied the entrants in 1984, we found that the majority of the local radio and local television entries that had women producers and/or women writers, the sensitivity demonstrated at the producer/writer level would be magnified at the ownership level.

AWRT is a strong supporter of the continuation of the minority and female preferences in comparative hearings for new radio and new television facilities. This position has worked fairly, because the preferences are only one factor in a multi-faceted review of the competing applicants.

In fact, the policy is particularly appropriate because of the underemployment of minorities and women for so many years in the broadcasting industry. Since prior broadcast experience is a factor for which an applicant can receive credit, the use of minority and female preferences acts as a useful counterbalance.

Use of a lottery in place of comparative hearing, as proposed by the commission, would remove the female preference, since the existing statutory language in the Communications Act does not include a female preference in mass media lotteries.

Furthermore, a lottery scheme means that valuable radio and television licenses will be awarded by chance. The award of important channels of communication to the citizens of this country should not be left to chance. Thus, AWRT supports continuation of the comparative hearings.

Furthermore, we believe that the preference policy is constitutional, as the U.S. Court of Appeals for the District of Columbia found in the Winter Park case, and it is also consistent with the decisions of the Supreme Court.

On the other hand, AWRT agrees with the decision of the U.S. Court of Appeals in the Shurberg case, that the FCC's minority distress sale policy and tax certificate policies raise serious constitutional concerns. We believe that the court's concerns can be met successfully.

The commission should expand its distress sale and tax certificate policies to include women and public broadcasters, and provide other individuals or entities an opportunity on a case-by-case basis to make a public interest showing that the use of the respective policy would be beneficial.

AWRT is grateful for the subcommittee's interest in maintaining policies that further the important public interest objective of diversity of broadcast ownership.

Thank you.

[The statement follows:]

**WRITTEN STATEMENT FOR SUBMISSION
TO THE COMMUNICATIONS SUBCOMMITTEE
OF THE COMMITTEE ON COMMERCE, SCIENCE
AND TRANSPORTATION, UNITED STATES SENATE**

September 15, 1987

Patricia Niekamp
President, American Women in
Radio and Television, Inc.

The Communications Subcommittee has invited American Women in Radio and Television, Inc. ("AWRT") to address the policies of the Federal Communications Commission ("FCC") in the following areas: the award of preferences to minorities and females in comparative hearing proceedings for new licenses; the distress sales of broadcast stations to entities controlled by one or more members of a minority group; and the award of tax certificates pursuant to Section 1071 of the Internal Revenue Code for the sale of broadcast facilities to entities controlled by one or more members of a minority group. In particular, the Subcommittee is interested in the impact of recent Court decisions on the FCC's minority ownership policies and whether there is a need for any changes in the existing policies. The Subcommittee also seeks information on whether minority and female ownership increases the diversity of views presented on the air.

AWRT, the oldest national professional organization composed of women and men employed in the electronic media or allied

fields, believes that it is in a uniquely appropriate position to address the issues of concern to the Subcommittee. The impact of the recent court cases is of great concern to AWRT. Many of AWRT's members work in management at broadcast facilities and their rise to that level has been assisted by the FCC's equal employment opportunity policies which have encouraged minority and female advancement in an industry in which minorities and women had long been seriously underrepresented. Now many of our members are attempting to move into ownership ranks but are finding that they may have reached a glass ceiling. Women have had difficulty in gaining equal access to financing and in moving into business ownership as recognized by such agencies as the Department of Labor which established a Women's Bureau and the Small Business Administration which has an Office of Women's Business Ownership. Numerous studies have addressed the continuing lack of parity between men and women in the workplace.

## I. Women Are Substantially Underrepresented in Broadcast Station Ownership

The underrepresentation of women in broadcast ownership was first documented by a study of the ELRA Group, Inc., prepared for the FCC in 1982, which found that women were majority owners of only 8.6 percent of all AM stations, 9 percent of all FM stations, and 2.8 percent of all television stations. In 1987, AWRT conducted its own analysis of female ownership of broadcast station groups and female management. The statistics showed the underrepresentation of women in the broadcast industry.

Specifically, AWRT's analysis of broadcast station group ownership revealed that women held equity ownership positions of more than 50 percent in only 4.3 percent of broadcast station groups (defined as an organization with more than one station), an increase of less than one percent since 1978. Additionally, AWRT's studies showed that women served as president, vice president or general manager of only 8.4 percent of all radio stations and 6.1 percent of all television stations. These percentages reflected only a very slight increase over a nine year period. Considering that women comprise 52 percent of the total population and their numbers in the labor force are high, the representation of women in broadcast station ownership and top management is woefully deficient.

## II. Minority and Female Ownership Increases The Diversity of Views Presented On The Air

The Communications Act of 1934, as amended, delegates broad authority to the FCC to allocate broadcast licenses in the "public convenience, interest and necessity." 47 U.S.C. § 307(a) (1982). Under the mandate granted by Congress, the FCC has developed a number of criteria to choose among competing applicants for broadcast frequencies.1/ The primary criteria considered by the Commission are diversification of the ownership of mass communications media and integration of ownership with management. Other criteria include efficient use of the fre-

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1/ See Policy Statement on Comparative Broadcast Hearings, 1 FCC 2d 393 (1965).

quency, comparative coverage, local residence, civic involvement, prior broadcast experience and minority and female credit.

Diversification of ownership has long been considered a factor of overriding significance to the FCC's licensing scheme because it will result in the diffusion of the ownership of mass media and the addition of new voices.2/ The courts have also recognized the distinct connection between diversity of ownership of the mass media and the diversity of ideas and expression3/ and have held that "the Commission acted rationally in finding that diversification of ownership would enhance the possibility of achieving greater diversity of viewpoints."4/

The use of the diversification criterion as a basis for awarding licenses has served a number of significant functions. It has enabled the Commission to largely avoid inquiries into factors such as proposed programming which would be difficult to evaluate in comparing applicants and would raise First Amendment concerns. It has focused the FCC's comparison of applicants on a structural analysis which is consistent with the structural focus of the multiple ownership rules. It has also helped to avoid concentration of media ownership - at least in new facilities. Basically, the structural approach embodied in the diversifica-

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2/ See e.g. Policy Statement, supra.

3/ See Citizens Communications Center v. FCC, 447 F.2d 1201 (D.C. Cir. 1977); TV 9, Inc. v. FCC, 495 F.2d 929 (D.C. Cir. 1973), cert. denied 419 U.S. 986; Greater Boston Television Corp. v. FCC, 444 F.2d 841 (D.C. Cir. 1970), cert. denied 403 U.S. 923.

4/ FCC v. National Citizens Committee for Broadcasting, 436 U.S. 775 (1977).

tion criterion has worked and has received widespread approval. Furthermore, the diversification criterion and the structural approach followed by the FCC is perfectly consistent with the principle that minority and female ownership will increase the diversity of views presented on the air.

The importance of the diversification criterion as a structural tool is reinforced by studies of the effect of minority and female ownership on programming. While the studies that have been conducted are limited in nature, they point to a nexus between minority and female station ownership and minority and other audience-targeted programming. In the spring of 1987, the FCC sent a questionnaire to 11,000 radio and television stations seeking information as to whether minorities or women held ownership interests in each station and requesting information as to the format of the station and the groups each station targeted in its programming. The FCC sought to gather this information in connection with MM Docket No. 86-484, its Notice of Inquiry proceeding to re-examine the constitutionality of the Commission's comparative licensing, distress sale and tax certificate policies based on racial, ethnic or gender preferences. Approximately 8,720 radio and television station owners responded to the questionnaire. Although the questionnaire could have been framed to yield more information, the results are nevertheless important.

The FCC itself never analyzed the responses it received; it terminated its reexamination of the comparative licensing, distress sale and tax certificate policies in order to comply

with the appropriations legislation for the Commission for 1988.[5/] However, at the request of the House Subcommittee on Telecommunications and Finance, the Economics Division of the Congressional Research Service, The Library of Congress, performed a statistical analysis of the information received by the FCC.[6/] The summary of that analysis states:

> The analysis showed that while the share of all stations in which members of minority groups hold an ownership interest is relatively small, the groups of stations that do have minority owners have a greater proportion of their stations programming for their own minority audience and, to a lesser extent, to other targeted audiences than do stations with no minority owners. Stations with women owners follow the same general pattern. However, their share of the total industry is greater than it is for minority owners, and they do not program to their own audience (women) as much as minority-owned stations program to theirs. ...based on these findings, there is a strong indication that minority and women station ownership results in a greater degree of minority programming. Therefore, an argument can be made that FCC policies that enhanced minority and women station ownership may have resulted in more minority and other audience targeted programming. To the degree that increasing minority programming across audience markets is considered adding to programming diversity, then, based on the FCC survey data, an argument can be made that the FCC preference policies contributed in turn, to programming diversity.

The analysis done by The Congressional Research Service is significant because the study was performed by an unbiased

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5/ Pub. L. No. 100-202 (signed Dec. 22, 1987).

6/ See Minority Broadcast Station Ownership and Broadcast Programming; Is There a Nexus?

reliable governmental research service which used a large pool of data collected by the FCC.

AWRT's own studies also reflect the impact of increased female participation in broadcasting on programming. For the past fourteen (14) years AWRT has hosted an Annual Commendation Awards ceremony which honors radio, broadcast and cable programs, advertisements, news and features which portray women in a positive and realistic manner. In connection with the ninth annual Commendation Awards program in 1984, AWRT collected data on the entries it received to determine whether increased female participation in broadcasting had an impact on programming. Significantly, 68% of the local television entries and 64% of the local radio entries had women producers, and 84% of the local television and 90% of the local radio entries had women writers. The representation of women among the entrants in the AWRT Commendations Awards program was substantially in excess of their representation in the broadcast industry as a whole.7/ The conclusion is that employment of women does make a difference in women's programming. AWRT submits that the same is true for minority programming as exemplified by the highly acclaimed "Bill Cosby Show."

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7/ Most of the entrants were not members of AWRT. Thus, any possible distortion of the analysis was unlikely.

## III. Preferences For Minorities and Females in Comparative Proceedings For New Licenses Should Continue

AWRT is a strong supporter of the FCC's policies to promote female and minority ownership of broadcast facilities through the award of female and minority qualitative enhancement preferences in comparative proceedings. Both the minority and female preference policies have congressional approval and the approval of the courts.

The recent court cases support continuation of the use of minority and female preferences by the FCC. In Winter Park Communications, Inc. v. FCC, No. 85-1755 (D.C. Cir., April 21, 1989), a three judge panel of the U.S. Court of Appeals considered the FCC's use of a qualitative enhancement for minority ownership and found that it passed constitutional muster. The Court noted the FCC's policy does not involve any quotas or fixed targets and minority ownership is simply one factor among several that the Commission takes into account in awarding broadcast licenses. While a different three judge panel of the United States Court of Appeals for the District of Columbia Circuit found the Commission's minority distress sale program unconstitutional in Shurberg Broadcasting of Hartford, Inc., No. 84-1600 (D.C. Cir., March 31, 1989), the Court distinguished Winter Park. Furthermore, the Order denying rehearing en banc in Shurberg, (issued June 16, 1989) amplified the distinction between Shurberg and Winter Park. Specifically, the Order

noted that Winter Park involved a comparative hearing and the minority preference in Winter Park was only a plus factor and not an absolute preference.

The minority and female preferences are also consistent with prevailing precedent of the U.S. Supreme Court. In Regents of the University of California v. Bakke, 438 U.S. 265 (1978), Justice Powell found that an educational institution has a compelling interest in promoting diversity, and that race could be used as one factor in a multi-factor admissions decision. The majority Opinion in Johnson v. Transportation Agency, 480 U.S. 616 (1987) held that the agency acted appropriately in taking into account the sex of a female applicant in determining that she should be promoted.

Both the Bakke and Johnson cases support the FCC's minority and female preference policies.8/ In addition to the fact that minority and female qualitative enhancement preferences in comparative hearings are one of a variety of factors, each of the other factors is weighted depending upon the strengths or weaknesses of that applicant's proposal. In other words, one applicant might receive greater credit for local residence than another applicant because of lengthier residence in the community or greater credit for civic involvement. Thus, the comparative hearing process involves the weighing of a number of factors

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8/ At present, the minority credit is more significant than the female credit. AWRT submits that the preferences should be equivalent. Furthermore, the term "minority" should be clarified by the addition of a definition of "Hispanic-surnamed" persons.

before a winning applicant is selected. The impact of the minority and female preferences is accordingly attenuated.

The study conducted by the Congressional Research Service in 1988 concluded that "the number of all FCC preference policies involved in current station acquisitions appears to have been an important factor in the number of stations with minority owners." CRS Study at 46. According to the study, the preference policies helped increase the proportion of minority programming being broadcast. Furthermore, as noted previously, the study found that stations with women owners program to female audiences although not to the degree that stations with minority owners program to their own minority audience groups. However, the study further found that a substantial percentage of stations with women owners program for Black and Hispanic audiences. Id. at 44.

## IV. The Commission's Proposal to Use a Lottery In Place of the Comparative Hearing Process Is An Ill-conceived Concept Which Will Adversely Affect Women

On March 10, 1989, the FCC released a Notice of Proposed Rule Making ("NPRM") in MM Docket No. 89-15, In the Matter of Amendment of the Commission's Rules to Allow the Selection from Among Competing Applicants for New AM, FM and Television Stations By Random Selection (Lottery). The NPRM proposes replacing the comparative hearing process with a lottery process. AWRT has filed a Petition for Immediate Termination of Proceeding which points out that the NPRM directly contravenes the appropriations

legislation for the FCC for fiscal year 1989[9/] because the Commission is attempting to eliminate its preference policies for women by eliminating the entire hearing process. AWRT has also filed substantive Comments which demonstrate that the premises for the proposed action are erroneous and there are available options for improving the comparative hearing process which are far preferable to a lottery scheme. Furthermore, AWRT has argued that the FCC has failed to justify use of a lottery for the purpose of granting an individual license for a full-service broadcast station. As the Commission's experience with LPTV lotteries and cellular lotteries has shown, lotteries encourage the filing of a multitude of applications by those looking to "get rich quick." They do not promote diversity or the public interest and they do not result in the best permittee or licensee. Lotteries should not be extended to cover the award of full-service stations.

The implementation of a lottery would eliminate the preference women now receive in comparative hearings. Under the Commission's existing statutory authority (47 U.S.C. §309(i)(3)(A), a significant preference may be granted to any applicant controlled by a member or members of a minority group when using a system of random selection. No similar preference is included for women even though in adopting the initial legislation authorizing award of a lottery preference for women in Commission proceedings (Public Law No. 97-35), Congress made

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9/ Pub. L. No. 100-459, 102 Stat. 2216-2217.

clear that it specifically considered women to be an "inadequately represented" group with respect to the nationwide ownership of the communications media.10/ Moreover, in the Conference Report on the subsequent lottery amendments, the conferees stated that they expected that women would be among the groups to benefit substantially from the lottery preference scheme.11/

A lottery scheme would also diminish minority preferences since there is no assurance in a lottery that a minority applicant would prevail. Instead a lottery scheme would substitute mere chance in place of rational decision-making.

## IV. The Commission's Distress Sale Policy Should Be Expanded to Include Women

As a general policy, the FCC prohibits licensees from assigning or transferring their licenses when the licenses have been designated for a revocation or renewal hearing on basic qualification issues. Over the years, however, various exceptions to the general policy have developed. For instance, the Commission has allowed incapacitated or bankrupt broadcasters to sell their stations at a distress price. In 1978, the Commission extended these exceptions to include distress sales to

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10/ See Omnibus Budget and Reconciliation Act of 1981, Conference Report, H.R. Rep. No. 97-208, 97th Cong., 1st Sess. (July 29, 1981) at 897.

11/ H.R. Rep. No. 97-765, 97th Cong. 2nd Sess. (1982) at 45.

prospective purchasers with significant minority ownership interests who meet the FCC's qualifications.12/

In Shurberg Broadcasting of Hartford, Inc., supra, the U.S. Court of Appeals for the D.C. Circuit held that the FCC's minority distress sale policy is unconstitutional because it violated the equal protection component of the Fifth Amendment. In particular, Judge Silberman's opinion for the Court and the concurring opinion of Judge MacKinnon expressed concern that the distress sale policy was not narrowly tailored and imposed a burden on non-minorities. The Order denying rehearing states: "Even all non-minority women are excluded." (Slip Op. at 1).

AWRT believes that the distress sale mechanism is an extremely useful device since it enables broadcasters whose licenses have been designated for hearing to sell their facilities to someone who is qualified, thereby avoiding the time and expense of a hearing. The use of the distress sale mechanism saves the FCC considerable administrative costs and removes a bad broadcaster far more quickly than a hearing before an Administrative Law Judge which the broadcaster can then appeal to the Review Board, the Commission and eventually the courts.

However, AWRT believes that the existing distress sale policy raises troubling constitutional questions which justify a revamping and expansion of the policy. Given the constitutional implications present in any decision to limit the distress sale policy only to minorities, the policy should be expanded to

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12/ Statement of Policy on Minority Ownership of Broadcasting Facilities, 68 FCC2d 979 (1978).

include other worthy groups as prospective purchasers such as women and noncommercial entities both of which have long been recognized as meriting assistance to promote the diversity of programming. Other entities should also be permitted to make a showing that use of a distress sale in their case would serve the public interest. Expansion of the policy will provide the Commission with the kind of escape value it needs to preserve the constitutionality of the minority distress sale policy.

## V. The Tax Certificate Policy Should Be Broadened to Include Women

Under 26 U.S.C. §1071, the FCC can permit sellers of broadcast properties to defer capital gains taxation on a sale whenever it is deemed "necessary or appropriate to effectuate a change in a policy of, or the adoption of a new policy by, the Commission with respect to the ownership and control of radio broadcasting stations...." Originally, tax certificates were used to remove the hardships occasioned by divestitures imposed by the Commission's multiple ownership rules. Subsequently, the FCC began to routinely approve tax certificates to licensees who voluntarily divested themselves of communications properties which had been grandfathered under the multiple ownership rules.13/ In its 1978 Statement of Policy on Minority Ownership of Broadcast Facilities, supra, the Commission announced that it would grant tax certificates to the assignor or transferor of a

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13/ Issuance of Tax Certificates, 19 RR2d 1831 (1970).

broadcast facility where the assignment or transfer would advance its policy of increasing minority ownership.

Tax certificates primarily benefit the sellers of broadcast facilities who are usually nonminorities. Minorities are secondarily assisted because sellers often prefer to sell to a minority-controlled entity to secure the tax benefits. AWRT believes that the FCC's tax certificate policy has the same constitutional infirmities as the distress sale policy. It is not a narrowly tailored plan and it has not been structured so as to minimize the burden on other nonminority purchasers. Therefore, AWRT submits that the tax certificate policy should be extended to include women purchasers and other groups on a case-by-case basis. It is well documented that there is a lack of parity between the earnings of men and women in the workforce and that women have been denied equal opportunities with respect to access to financial markets. A broadening of the tax certificate policy would enable women to overcome these disadvantages.

## Conclusion

AWRT urges the Subcommittee to give careful consideration to the needs and interests of women in considering legislative action affecting the FCC's minority and female policies.

Senator INOUYE. Thank you very much, Ms. Niekamp.

Before proceeding with my questions, I would like to reiterate what I believe is the intent of this subcommittee. We wish not only to maintain and protect the minority policies of the FCC, but to do so, if necessary, by codifying them.

Secondly, we are concerned about evidence we have received on the matter of sham or front organizations that are masquerading as minority groups and receiving the benefits of the policies.

Third, we are concerned about the comparative process, which has been rather slow and tedious. We will hope that this can be expedited.

And finally, we are hoping that once you become owners, you would carry on the intent of the law and hire minorities and females. We have heard that once these minority entities get a company, they suddenly become non-minority, as far as their employment policy is concerned.

I assure you that we will be monitoring these matters.

Before proceeding, I would like to express to you, Mr. Winston, my regrets in not being able to attend your function last evening. I had every intention to be there, but, as you know, we were tied up last night with appropriations measures. And as a member of the Committee, I felt I had to be there to see that the proper dollars are spent.

Mr. WINSTON. We understand, sir. The invitation is open for the next one.

Senator INOUYE. Yes, sir.

First, I would like to ask all of you whether any of you would be opposed to the codification of the comparative preference?

Mr. SUTTON. I think not, sir.

Senator INOUYE. I just wanted the record to show this. Would any of you be opposed to expediting the comparative process?

Mr. WINSTON. Certainly not.

Mr. SUTTON. I hope not.

Senator INOUYE. Would any of you be opposed to strengthening and maybe codifying the policy as it relates to what constitutes a minority?

I should point that just a few minutes ago I was presiding over a mark-up session on a committee that I chair, the Committee on Indian Affairs, and one of the measures considered was the Buy Indian Act, in which we address the problem of Indian fronts.

Do you think that sham organizations or minority fronts constitute a major problem?

Mr. SUTTON. I think they constitute, certainly, a problem of perception Because, if there are any shams discovered, I think, among legislators and persons who must evaluate, members of the commission, I think that can be used as an excuse for discontinuing the program.

So I do not know how much of a problem it is in actuality, but if there is one sham and that is used as an excuse for discontinuance or diminishing of the program, that is one sham too many.

Senator INOUYE. Mr. Winston.

Mr. WINSTON. Yes, I think there are two different areas where we have seen allegations of sham raised. One, of course, is in the comparative hearing area; the other is in station purchases. And I

think that they need to be addressed separately because, in a comparative hearing, you have got many applicants fighting among themselves.

In a purchase situation you got one party coming forward to the FCC saying I am the buyer, another party coming forward saying I am the seller. The FCC has a statutory period it has to go through to review that application, and it has the ability at that time to request any additional information it chooses, which it can review directly.

There was one instance a couple of years ago, a major television station purchase, where a minority, who had on paper 21 percent ownership and control of a limited partnership, was putting up no money, but was going to be allegedly in control of a $300 million television station.

Also in the purchase agreement was an agreement that the limited partner could buy the general partner out at the end of one year for $1 million. The limited partner was quoted in the trade press as having said that by getting a tax certificate through using this structure, they were able to get the station for $100 million less than its fair market value by saving the seller that much in capital gains tax.

When I saw that application announced in the trade press, I assumed that that would never pass FCC review. The FCC reviewed that transaction and said that the only change they required would be that the buy-out provision that the limited partner would be able to buy out the general partner for a $1 million had to be after two years, instead of one year.

Now, it seems to me that, you know, at some point in time, you have got to say it is not that we need additional regulation, it is we need real enforcement. I mean, you know, the FCC has the right at that point to say we think we have in front of us a sham application; we are going to disapprove this purchase.

So it is not a matter of regulation on that side.

I think, as to comparative hearings, you have a different situation. In major markets where they have dropped in new frequencies for the 8090 hearings, you have, oftentimes, 20 applicants in a hearing. And the FCC does not have the resources to review the underlying documentation of all those applications.

So I think there you do need to do something, in terms of sham applications, because I think the case law has demonstrated that, for the number of applications that go through, they are finding huge numbers of shams as a result of the routine processing in the comparative hearing process. I would suspect that there are a large number that go undetected. So I think, there, the sham application process does need to be looked at.

I think that we have a situation where the FCC is probably going to have to go full circle. Sham applications were not a problem before deregulation. What happened was, when I first started doing comparative hearings, the FCC application form was very thick. And an application was a huge book by the time you filed it.

The FCC said well, this puts too much burden on initial applicants and we are going to reduce that. And so they basically said just give us your name and address and, you know, tell us where

you want to build a station. I mean, that is essentially about the amount of information you were getting in the application.

That is what led to the ability, among other things. They also started acknowledging two-tiered entities, general partnerships, where there is a general partner working at a station, and a limited partner who is not. They started acknowledging two-tiered corporations, voting shareholders versus non-voting shareholders, and not looking behind the documents for these things.

So once they put all those things in place, the process was ripe for sham applications.

So, I think what they have got to do is go back a few years and look at what they were doing before. I think they properly jettisoned some portions of the application process, but I think they threw out too much. I think they need to go back and get some of that information back, and take another look at the two-tiered structures and see if that really makes sense.

Senator INOUYE. Mr. Huhndorf, you do not have that problem, do you?

Mr. HUHNDORF. We do have the problem in that we have spoken out, Mr. Chairman, in the form of a statement we have filed with the FCC strongly opposed to sham transactions and suggesting stronger enforcement and possibly some changes in policies that would help to prevent that sort of abuse.

Senator INOUYE. Ms. Niekamp.

Ms. NIEKAMP. AWRT also concurs. And in the petition for immediate termination of the rule-making, that was the position that we took; that the FCC, in essence, through deregulation, a lot of this has occurred. And it can be taken care of by reinstituting a lot of the previous policies to pre-qualify applicants.

Senator INOUYE. Before I call upon my distinguished friend from Montana, who is himself a broadcaster, I would like to share with you the following.

Yesterday I was interviewed by a member of the press and he asked me what is the top priority of this subcommittee. I said, well, I cannot speak for the subcommittee, but I can speak for myself. My top priority is to bring about a change in the relationship between this Committee and the FCC.

I believe that for too long we have assumed adversarial postures, and trying to outdo the other as to who can gut the other better. I have already started my discussions with the Chairman, Mr. Jikes, and I believe that if the FCC and the Congress can work together, some of the problems that you have cited can be resolved, possibly without legislation and without rancor. And that is the way we hope to do it.

I have found, by looking over the record of this subcommittee, that in the past, matters that should have been easy in passing have had to go through a rocky path because of the adversarial relationship with the FCC.

That is my number one priority.

Before I call upon Senator Conrad Burns, Mr. Sutton, I thank you very much. Every so often I spend early Sunday morning watching "Showtime at the Apollo."

You may find me applying for your amateur night.

Mr. Burns.

## OPENING STATEMENT BY SENATOR BURNS

Senator BURNS. Thank you, Mr. Chairman.

I am sorry I am not as punctual as you. I did not get around very early this morning. But I think I am still working on Montana time; it is just a little after breakfast time there.

In the first place, I have an opening statement for the record.

Few issues in recent years have stirred as much debate in the communications industry as the question of "benign" discrimination—the use of racial and gender classifications to benefit particular racial, ethnic or gender groups. The Federal Communications Commission's [FCC] current minority ownership policies—the minority preference in the comparative licensing process and the tax certificate and distress sale policies—are all designed to expand minority and female station ownership of broadcast properties in order to foster programming diversity. While I firmly believe that one of the FCC's most important goals is to foster increased opportunities in the communications industry for those who have heretofore been underrepresented, I note that there are constitutional issues and practical problems which have been raised in the past with respect to the FCC's existing minority preference policies.

Despite the operation of these minority preference policies for over the last decade, minorities remain woefully underrepresented in the ownership structure of the broadcast industry. I, therefore, strongly recommend that the FCC examine new ways to increase and promote minority ownership of broadcast properties in order to foster programming diversity. Most importantly, however, these new approaches must be thoroughly studied and analyzed to ensure that they avoid the the constitutional and practical problems which have plagued the existing policies.

While the FCC's existing policies focus primarily on the licensing process and the grant of the initial license, perhaps the emphasis is somewhat misplaced since over 70 percent of current station owners acquired their properties through transfer. Since there seems to be agreement that financing and capitalization of station acquisition are the two greatest obstacles in preventing further gains in minority ownership, primary future activity should focus on examining ways of removing or substantially reducing that economic barrier to entry.

One such approach, for example, might be the creation of a task force or advisory committee to examine new ways the FCC could increase minority ownership and thereby foster program diversity. The last study of this type was conducted in 1982. Since that time the industry has changed dramatically, including regulatory changes, development of new technologies and changes in the methods and availability of financing required for entry into the industry. Such a task force could recommend, for example, that the FCC conduct or assist in the creation and development of specific conferences, workshops and literature that address the critical financial, management and technical aspects of broadcast ownership in order to promote a better flow of information to prospective minority owners. The task force may also encourage the development of governmental assistance and loan programs for "low income" or "small business" applicants who wish to become involved in the

communications industry and who qualify under a "race-neutral", means-based test. Private financial institutions should be encouraged to provide loans to minorities in order to provide the needed capital for station acquisition.

Beyond this, the FCC must remove regulatory barriers that may unintentionally discourage minority ownership. For instance, the complex, lengthy and costly nature of the FCC's comparative licensing process imposes substantial economic and other burdens (e.g., legal and engineering consultant fees) on minority applicants who do not have the funds needed to withstand this regulatory maze. In this regard, I am very interested in the FCC's ongoing reexamination of its comparative new licensing process. Finally, rigorous enforcement of the FCC's new EEO rules is vital because *employment* opportunities for minorities and women can lead to greater *ownership* opportunities.

In conclusion, let me reiterate that one of the FCC's most important goals is to foster increased opportunities for those who have historically been underrepresented in the communications industry. Congressional and FCC policies designed to achieve that goal must, however, above all else, guarantee equal protection of the laws for all Americans and be structured to avoid sham arrangements.

Thank you Mr. Chairman. I look forward to the testimony from our distinguished witnesses.

Senator BURNS. I guess what troubles me was pretty eloquently put by our chairman this morning, and that is the sham operations. We hear all kinds of horror stories out there on application and, of course, in stations or properties changing hands.

Mr. Sutton, if these rules were not codified, do you think we are through the era of the 1940s and 1950s and the problems that you and your family experienced getting into ownership? Are we through that kind of an era now? Should we revamp, rather than codify? Or are we still experiencing great problems out there?

Mr. SUTTON. In the purchasing of radio stations?

Senator BURNS. Yes.

Mr. SUTTON. I mentioned earlier, we are paying what I call a black tax. And that is an increase in price because we did not have the opportunity to make application for radio and television licenses when they were originally issued, so they have become enhanced and appreciated in value since then.

With regard to purchasing, the largest difficulty now is getting a lending institution to lend money to you. In my instance, as I said, more than 50 visits to institutions were required. And, of course, then when I sought to buy a cable television, we again had lending institutions—not because of an absence of equity, but an absence of a lending institution that was willing to commit itself to a minority, even a minority who had had vast experience in finance.

So I suggest to you that it is not difficult to buy a station. There are not people who refuse to sell to you, but it is the price that is a barrier in so many instances at the present.

Senator BURNS. Can you cite instances where a radio station might charge you more for a radio station than anybody else if you were a willing buyer? In other words, I have listed my radio station on the market and this is my selling price, and you come in and

you say well, I will take it. You have got the money. Do you run into cases where it costs you a different price than it would cost me?

Mr. SUTTON. Senator, unfortunately, I am not a good barometer of that which exists, because I have not shopped for radio stations. All the stations that I have bought have come to me through brokers. Maybe some of my colleagues could give you some instance of that.

Mr. WINSTON. Senator, let me give you an example of the nuances that occur today. If I am a seller of a station, there are numerous different ways I can sell. Obviously, I can make an all-cash deal or I can take back a note. What you will find, if it is a minority buyer, that buyer is more likely going to have to come up with all cash, whereas another buyer might be able to do cash and the seller take back a note.

But the seller would be more reluctant to take back a note from a minority buyer. As Mr. Sutton said, it is not that nobody will sell you, but the terms may be different, in terms of how they actually play out.

Senator BURNS. That distresses me a little bit.

When he says that I am a broadcaster, I am a farm broadcaster. I just dealt with agriculture and those kind of issues. I would never make a sportscaster and I am not a hard news guy and I am not a disk jockey; I just do agriculture broadcasting.

Ms. Niekamp, I have a question for you. Now, I know what a farm broadcast is, but I want to know what female programming is. Can you define it?

Ms. NIEKAMP. It is certainly not an easy question, and one that I answer with a little bit of difficulty.

I guess female programming is programming that addresses the concerns of women, the issues that face women: day care, dual-income families, women in the work place. And women, it is our experience, are more ready to bring those kinds of topics to television, to news broadcasts, and to deal with those kinds of issues.

It has been our experience that those issues are brought forward more when women are a part of the broadcast team or the writing and producing team, more so than men.

Senator BURNS. Are you saying, then, those issues would not be brought if it was not for this?

Ms. NIEKAMP. No, sir, I am not saying that. What I am saying is I feel that women bring more empathy and more sensitivity to those issues because they have first-hand experience.

Senator BURNS. And where is your station in Minnesota?

Ms. NIEKAMP. Southern Minnesota, Austin. I am in the seventh largest agriculture market in the country, by the way.

Senator BURNS. You kill a lot of hogs down there, too, do you not?

Ms. NIEKAMP. As a matter of fact, we do.

Senator BURNS. You see I am coming from a different background, and here I come out of the State of Montana, and we have only got 800,000 people out there. We have got 138 acres for every living soul in Montana. So if you folks get a little crowded, why, we have got a lot of room to expand out there.

But I would also ask Mr. Winston for some definition—you know, we look at definitions of minority programming. I guess we do not look white or black out there, you know, too much. We pretty much take people at face value. How would you define minority programming for me, please?

Mr. WINSTON. In radio, for example, I would say that there are some radio formats, which are distinctly geared toward minority audiences. Some radio stations designate themselves as doing a black format, for example. And by that they mean that they are playing music, virtually all of which is done by black artists, with the exception of some in what I would call reverse cross-over. There are some white artists who get played on black-formatted radio stations.

Also, in the public interest/public affairs area, on those same stations, you will see issues addressed, organizations brought in from the minority community, who would not otherwise be invited to participate.

Certainly, looking at the whole range of First Amendment kinds of things, you might see some organizations that might be offensive to other segments of the audience who might get a voice there. And likewise, a lot of organizations which might not have the kind of visibility, might not have offices and telephones, might be very grassroots kinds of organizations that you would not find, you know.

In broadcasting, there is an ascertainment process. And ascertainment means you go to the group—it used to be required by the FCC, and you had a form you filled out. And everybody knew that when ascertainment time came around you went and you talked to the Urban League and you wanted to talk to the NAACP, and all the radio stations had to do that. And that was meeting your goal to talk to the minority community.

Well, there are a lot of minority organizations that do not have telephone numbers that you cannot find them for ascertainment, and you have to be out there in the community. And that is what you see on black-owned radio and black-formatted radio.

Senator BURNS. Do you see some areas here where it may be reverse discrimination?

Mr. WINSTON. In what sense?

Senator BURNS. In other words, here I am just an old farmer who will walk into a radio station in New York City and maybe I would like to put my farm program on in New York.

Mr. SUTTON. I would be happy to have you, sir.

I say that not entirely in jest.

Senator BURNS. I know. And I do not mean it in jest, either.

Mr. SUTTON. What we attempt to do in programming to an African-American community is to me the special needs of that community. When we talk about diversity of programming, I hope this is not offensive to say that African-Americans and perhaps some other groups in American live in two worlds, but especially African-Americans, because we are always distinguishable and we never rise out of that status of being distinguished. And that is, we are distinguished by the color of our skins. And the color of our skins often determines where we shall live, what kind of jobs we shall have, what problems afflict themselves upon us.

The result of this is that when you talk about diversity of programming, should there be? Is there an advantage in having African-Americans and other minorities have an opportunity to be competitive in the open society, as far as broadcasting is concerned? And there answer is that, because of the special problems of African-Americans, which will never be overcome until there is real equality in our society, not equality just of laws, but equality of justice and the perception of people, then there will be a need for special programming.

In our own facilities of inner-city broadcasting, that which I am entirely familiar with, and those of some other African-American-owned facilities, there is a special effort to deal with those peculiar problems that afflict that community.

So if one asked the question of would there be reverse discrimination? The answer is no, not only in our employment practices, but in our programming; we ask for the other point of view as well. But our particular focus is upon meeting the needs of our community.

May I give you a specific example? I said that one of our radio stations, WLIB in New York City, is only a sunup to sundown radio station. And despite all of our efforts through the years, we have been unable to change this because we interfere with someone in Indiana.

The result is, however, that the people return every day to that radio station and they return because someone is going to be discussing health problems that are peculiar to black people. For example, African-Americans have a higher incidence of heart problems. We have a higher incidence in a number of health areas. We have peculiar problems in being able to move out of that specific community known as the ghetto into the outer communities, because those problems are in the nature of banks not red-lining districts and not lending us money.

All of these problems are specialized problems that occur in the African-American community, so when we talk about programming, we are programming to that need. And, sir, there is so much greater a need to be met than is now being met by all of the programs of the FCC and all of the good intention, all of the legislation that exists.

America, and I say this in the 69th year of my life, as someone who grew up under segregated circumstances in San Antonio, Texas, who went to black schools, rode in the back of buses and on the front of trains, who drank from separate water fountains, who went on to serve in two wars and to have a son serve in yet another war, I say, sir, that I am seeing now an improving America.

But if America is ever to be the America that all of us want, you want and I want and all of us want, that is, an America of equality, one of the venues through which we must travel, to which we must go, is that of permitting greater access of African-Americans to meet, through broadcasting, and meet the specialized problems of African-Americans.

Senator BURNS. Thank you. I could not agree with you more, and I appreciate your statement very much. When I come back here, it is a learning process for me, as you well know.

Senator INOUYE. Thank you, Senator.

One other question just for the record. I would assume that all of you are in favor of the tax certificate.

Mr. WINSTON. Yes.

Mr. SUTTON. Yes.

Mr. HUHNDORF. Yes.

Senator INOUYE. You do not want it repealed?

Mr. WINSTON. No, we want it codified.

Senator INOUYE. Well, Ms. Niekamp and gentlemen, I thank you very much for your participation.

I would like to announce at this time that the staff is in the process of drafting a measure to codify the preference and tax certificate policies.

But before we go any further, we will be sending copies to you as we would do with the FCC and hopefully by this process you can provide an input, and we can come forth with a measure that will meet your needs, address your needs, and will be one that would be approved by the FCC.

So, I hope you will join us in this process. We want to come up with something that will help and not obstruct you.

Mr. SUTTON. Thank you very much.

Senator INOUYE. Now, may I call upon the Deputy Chief of the Mass Media Bureau of the Federal Communications Commission, Mr. Roderick Porter.

## STATEMENT OF RODERICK PORTER, DEPUTY CHIEF, MASS MEDIA BUREAU, FEDERAL COMMUNICATIONS COMMISSION

Mr. PORTER. Good morning, Mr. Chairman, Senator Burns.

I have with me today an abbreviated version of my written testimony which I would like to read.

Senator INOUYE. Your full statement is made part of the record, sir.

Mr. PORTER. Thank you, Senator. First, thank you for allowing the Federal Communications Commission this opportunity to discuss the Commission's minority and female ownership policies. The Commission agrees that this is a timely and important issue.

As you have indicated, in the past the Commission has enforced three policies designed to facilitate minority ownership of broadcast stations.

Two of these policies, the comparative preference and tax certificate policies are still in effect today. The third, the distress sale policy, was recently declared unconstitutional by the D.C. Circuit and, therefore, can no longer be implemented by the Commission.

First, among recent court decisions that have had a major impact on these policies, in the *Shurberg* decision, a panel dealt with the continuing validity of the 1984 *West Michigan* case in which the D.C. Circuit expressly held that the FCC's use of an enhancement for minority status as one element in the comparative licensing process passes constitutional muster.

The current issue, therefore, is whether *West Michigan* remains good law and whether the Commission's minority ownership policies are consistent with the subsequent Supreme Court precedent on racial preferences enunciated in such decisions as *City of Richmond* v. *Croson* and *Wygant* v. *Jackson Board of Education.*

In *Shurberg* the majority panel concluded that the distress sale policy is unconstitutional because it is not narrowly tailored to remedy past discrimination or to promote diversity and constitutes an undue burden on non-minorities.

By contrast in *Winter Park*, a different panel of the same court found that the FCC's comparative preference policy continues to pass constitutional muster under *West Michigan* because no subsequent Supreme Court decisions had undermined the rationale of the decision in this regard.

In summary, the D.C. Circuit has again affirmed our comparative preference policy in *Winter Park*, but has left us with three different opinions on the constitutionality of our distress sale policy in *Shurberg*.

The D.C. Circuit has refused to hear this case en banc. At the present time the matter is being actively considered by the Commission as a prelude to deciding whether any further action, including a possible certiorari request is appropriate in the *Shurberg* case.

I now turn to the specific concerns as to whether minority and female ownership increases the diversity of views presented on the airwaves and whether there is a need to change our policies to further this objective.

It has long been an assumption—first by the D.C. Circuit Court and later by the FCC—that our minority ownership policies should lead to a diversity of viewpoints, particularly to the extent that minority perspectives are not otherwise expressed.

In addition, the FCC's minority policies are based on our conclusion that the entire broadcast audience, regardless of its racial composition, will benefit from exposure to programming that has a minority perspective apart from the issue of providing programming that is targeted to appeal to a minority audience.

Credit given for female ownership and participation essentially is based upon the same assumptions noted above for minority ownership.

As to whether we need to change our minority ownership policies to further the objectives of the rules, presently we see no need to alter the tax certificate policy.

With respect to the comparative process for new stations, on March 10 the FCC issued a notice of proposed rule making which proposes the elimination of comparative hearings and the utilization of random selection or lottery procedures as authorized by section 309(i) of the Communications Act.

The main substantive difference between the proposed lottery system and the current process is that lotteries would simplify the licensing process by replacing the numerous comparative criteria, including minority ownership credit, with the existing statutory system of granting significant preferences or additional chances for minority applicants and/or those who would diversify mass media ownership.

Because the lottery statute does not include a female ownership preference, however, we solicited comment as to whether it would be possible to create such additional preferences without diluting either the minority or diversification preferences provided under the statute.

Again, thank you for this opportunity to present the commission's views. I would be happy to answer any questions you might have.

[The statement and questions and answers follow:]

STATEMENT OF RODERICK K. PORTER, EEPUTY CHIEF, MASS MEDIA BUREAU, FCC

Good morning, Mr. Chairman and Members of the Subcommittee. First, thank you for allowing the Federal Communications Commission this opportunity to discuss the Commission's minority and female ownership policies. The Commission agrees that this is a timely and important issue. This morning I will discuss recent court rulings and their impact on our minority ownership policies. In addition, I will address your specific concerns as to whether minority and female ownership increases the diversity of views presented on the airwaves and whether there is a need to change our policies to further this objective.

To start, let me briefly review the history of the Commission's minority and female ownership policies and how they operate. As you know, in the past the Commission has enforced three policies designed to facilitate minority ownership of broadcast stations. Two of these -- the comparative preference and tax certificate policies -- are still in effect today. The third -- the distress sale policy -- was recently declared unconstitutional by the D.C. Circuit, and therefore can no longer be implemented. Shurberg Broadcasting of Hartford, Inc. v. FCC, 876 F.2d 902 (D.C. Cir. 1989).

First, under the comparative preference policy, the FCC awards minority and female preferences in comparative licensing proceedings to applicants whose principals will be directly involved in a broadcast station. Specifically, the Commission treats minority ownership and participation as an enhancement to the ownership and management criterion, a generic preference

element used in the comparative licensing process to evaluate which competing applicant is likely to provide the best practicable service to the public.

The FCC initiated the minority enhancement credit in 1973, in response to the D.C. Circuit's determination that "when minority ownership is likely to increase diversity. . . of viewpoint, merit should be awarded." TV 9, Inc. v. FCC, 495 F.2d 929, 938 (D.C. Cir. 1973), cert. denied, 419 U.S. 986 (1974). Since then, the D.C. Circuit has twice upheld the comparative credit for minorities, first in West Michigan Broadcasting Co. v. FCC, 735 F.2d 601 (D.C. Cir. 1984), cert. denied, 470 U.S. 1027 (1985), and as recently as last April in Winter Park Communications, Inc. v. FCC, 873 F.2d 347 (D.C. Cir. 1989).

Second, the Commission adopted its distress sale policy in 1978 as an alternative to the lengthy and costly comparative hearing process, concluding that the dearth of minority broadcast owners continued to be an obstacle to the public interest goal of diverse programming. Statement of Policy on Minority Ownership of Broadcasting Facilities, 68 FCC 2d 979 (1978). This policy allows applicants controlled by members of certain specified minority groups to purchase a broadcast station at a "distress sale price," defined as no more than 75% of the fair market value of the property, from an existing licensee whose license has been designated for a renewal or revocation hearing if no other party

has filed a timely competing application. Ordinarily, licensees are not permitted to sell a station under such circumstances until the questions that led to the hearing designation have been resolved.

Finally, the Commission grants tax certificates pursuant to section 1071 of the Internal Revenue Code for the sale of broadcast properties to one or more members of a minority group, or for the investment of start-up capital in minority broadcast entities. As with the other policies, the tax certificate policy has also been mandated by Congress since 1987, but it has never been subject to judicial challenge.

As I have already mentioned, recent court decisions have had a major impact on these policies. Most significantly, the FCC is no longer able to implement its distress sale policy in light of the D.C. Circuit's Shurberg decision, which held that the policy is unconstitutional because it is not narrowly tailored to remedy past discrimination or to promote program diversity and constitutes an undue burden on innocent non-minorities. On the other hand, less than a month later, a different panel of the D.C. Circuit affirmed the FCC's comparative preference policy in the Winter Park decision in the face of constitutional arguments similar to the ones raised in Shurberg. Petitions for rehearing en banc were denied in both cases.

In Shurberg, the panel dealt with the continuing validity of the 1984 West Michigan case, in which the D.C. Circuit expressly

held that the FCC's use of an enhancement for minority status as one element in the comparative licensing process passes constitutional muster. 735 F.2d at 613. In West Michigan the court had found that the Commission's comparative preference policy was consistent with the Supreme Court's holding in Regents of the University of California v. Bakke, 438 U.S. 265 (1978), and Fullilove v. Klutznick, 448 U.S. 448 (1980), because it promoted diversification of viewpoints and because minority ownership was but one of several factors the Commission considers under its comparative licensing criteria. The current issue, therefore, is whether West Michigan remains good law, and whether the Commission's minority ownership policies are consistent with the subsequent Supreme Court precedent on racial preferences enunciated in such decisions as City of Richmond v. J.A. Croson Co., 109 S.Ct. 706 (1989), and Wygant v. Jackson Board of Education, 476 U.S. 267 (1986).

In Shurberg, the majority panel concluded that the distress sale policy is unconstitutional because it is not narrowly tailored to remedy past discrimination or to promote program diversity and constitutes an undue burden on non-minorities. Each of the three opinions in Shurberg treats West Michigan differently. Judge Silberman questioned West Michigan's conclusion that there is a compelling government interest in increasing diversity of programming. However, he concluded that the court was not bound by West Michigan because the Supreme Court's decisions in Wygant and Croson had undermined West

Michigan's determination that there is a nexus between ownership and programming. Judge MacKinnon's opinion does not address West Michigan per se but insisted that preference policies must be narrowly tailored.

In dissent, Judge Wald indicated that at least some of the conclusions in West Michigan have not been undermined by subsequent Supreme Court decisions. She added that "[i]n casting off a thoughtfully conceived and monitored program aimed at attaining a legitimate congressionally mandated end, the majority has too rigidly applied Supreme Court affirmative action guidelines designed for other types of programs, ignored firm precedents in this circuit, and failed to credit the explicit intent of Congress." 876 F.2d at 934.

By contrast in Winter Park, a different panel of the same court found that the FCC's comparative preference policy continues to pass constitutional muster under West Michigan because no subsequent Supreme Court decisions had undermined the rationale of the decision in this regard. In a dissenting opinion, however, Judge Williams argued that West Michigan has been largely undermined by the Supreme Court's decisions in Wygant and Croson.

Thus, the D.C. Circuit has again affirmed our comparative preference policy in Winter Park, but has left us with three different opinions on the constitutionality of our distress sale policy in Shurberg. As noted earlier, the D.C. Circuit has refused to hear this case en banc. At the present time, the

matter is being actively explored by the Commission as a prelude to deciding whether any further action, including a possible certiorari request, is appropriate in the Shurberg case.

Having discussed the recent court decisions, I will now turn to the Committee's specific concerns as to whether minority and female ownership increases the diversity of views presented on the airwaves and whether there is a need to change our policies to further this objective.

With respect to the first issue, the Commission has not compiled factual evidence to determine whether our ownership policies, in fact, serve their intended purpose of increasing viewpoint diversity. Indeed, the primary purpose of the FCC's 1986 Notice of Inquiry on minority ownership was to obtain such evidence, but the Commission closed this inquiry in January 1988 in compliance with a congressional directive in our appropriations legislation. It has been a longstanding assumption -- first by the D.C. Circuit and later by the FCC -- that our minority ownership policies should lead to a diversity of viewpoints, particularly to the extent that minority perspectives are not otherwise expressed. Of course, it may be equally likely that non-minority broadcast station owners who air programming that is targeted to appeal to the minority audience also may succeed in presenting such diverse viewpoints. Nonetheless, the FCC's minority policies are based on our conclusion that the entire broadcast audience, regardless of its racial composition, will benefit from exposure to programming that has a minority

perspective, apart from the issue of providing programming that is targeted to appeal to a minority audience. Credit given for female ownership and participation essentially is based upon the same assumptions noted above for minority ownership. Steele v. FCC, 248 U.S. App. D.C. 279, 293 (D.C. Cir. 1985).

Let me now turn to the second issue of whether we need to change our minority ownership policies to further the objectives of the rules. We have in fact proposed modifying our comparative preference policies, which include minority ownership enhancements, in the course of a more general reform of the whole comparative licensing process. Presently, however, we see no need to alter the tax certificate policy.

With respect to the comparative process for new stations, on March 10 the FCC issued a Notice of Proposed Rule Making which proposes the elimination of comparative hearings and the utilization of random selection or lottery procedures, as authorized by Section 309(i) of the Communications Act, to select among mutually exclusive applicants for new AM, FM, or television stations. The main substantive difference between the proposed lottery system and the current process is that lotteries would simplify the licensing process by replacing the numerous comparative criteria with the existing statutory system of granting significant preferences or additional "chances" for minority applicants and/or those who would diversify mass media ownership. Because the lottery statute does not include a female

ownership preference, however, we solicited comment as to whether it would be possible to create such additional preferences without diluting either the minority or diversification preferences provided under the statute.

In summary, it is my expectation that the Commission will continue to implement its policies to encourage full minority ownership and participation in the tax certificate area and in the comparative preference area.

Again, thank you for this opportunity to present the Commission's views on these matters. I would be happy to answer any questions you might have.

**Follow-up Questions from Senator Conrad Burns**
**Senate Communications Subcommittee Hearing on Minority Ownership**
**September 15, 1989**

**1. What are your views on whether the FCC's minority preference policies (comparative licensing, distress sale and tax certificate) are constitutional, and why?**

The Commission's distress sale policy was recently declared unconstitutional by the D.C. Circuit, and therefore can no longer be implemented, pending possible Supreme Court review. Shurberg Broadcasting of Hartford, Inc. v. FCC, 876 F.2d 902 (D.C. Cir. 1989). On the other hand, the D.C. Circuit has twice upheld the constitutionality of the minority enhancement credit, first in West Michigan Broadcasting Co. v. FCC, 735 F.2d 601 (D.C. Cir. 1984), cert. denied, 470 U.S. 1027 (1985), and as recently as last April in Winter Park Communications, Inc. v. FCC, 873 F.2d 347 (D.C. Cir. 1989). The Commission's tax certificate policy has never been subject to judicial challenge and therefore, in my view, it continues to pass constitutional muster.

**2. In the past, the FCC has stressed the need for establishing an empirical nexus between minority ownership of broadcast facilities and diversity of programming to make the minority preferences constitutional. In your view, is such an empirical nexus necessary? Has such an empirical nexus been established?**

In both West Michigan and Winter Park, the D.C. Circuit has upheld the minority enhancement credit in comparative proceedings without finding a need for further evidence of an empirical nexus between minority ownership of broadcast facilities and diversity of programming. Furthermore, in rejecting the distress sale policy in Shurberg, the majority panel did not rely upon the lack of such an empirical nexus. Therefore, no further empirical evidence is necessary at this time.

The Commission has not compiled factual evidence to determine whether its ownership policies in fact serve their intended purpose of increasing viewpoint diversity. Indeed, the primary purpose of the FCC's 1986 Notice of Inquiry on minority ownership was to obtain such evidence, but the Commission closed this inquiry in January 1988 in compliance with a Congressional directive in our appropriations legislation. The Commission and D.C. Circuit have long agreed, however, that the FCC's minority ownership policies further diversity of viewpoint. In TV-9 Inc. v. FCC, 495 F.2d 929, 938 (D.C. Cir. 1973), cert. denied, 419 U.S. 986 (1974), the court held that "it is upon ownership that public policy places primary reliance with respect to diversification of content, and that historically has proven to be significantly influential with respect to editorial comment and the presentation of news." The FCC's minority policies are based on the Commission's conclusion that the entire broadcast audience, regardless of its racial composition, will benefit from exposure to programming that has a minority perspective.

**3. While the U.S. Supreme Court has issued numerous and varied opinions on the issue "benign" discrimination -- the use of racial and gender classifications to benefit particular racial, ethnic or gender groups -- and various terms and standards have been bandied about, the recent Supreme Court precedents make clear that racial and gender classifications are inherently suspect and will be subject to close and careful scrutiny. After the Supreme Court's recent decision in City of Richmond v. Croson, what standard of review is the FCC required to utilize in evaluating the constitutionality of its minority preference policies? Is the test "strict scrutiny," "heightened scrutiny," "rational relation" or something else?**

In City of Richmond v. J.A. Croson Co., 109 S. Ct. 706 (1989), a majority of the Supreme Court held for the first time that race-based remedial measures are subject to a "strict scrutiny" standard of review, at least when implemented by a state or local government. Supreme Court precedent suggests that more careful scrutiny will be given to state and local government race-based remedial measures than to measures adopted by the federal government. Although the D.C. Circuit did not address the standard of review issue in Winter Park, in Shurberg Judges MacKinnon and Silberman appeared to agree that a strict scrutiny standard is appropriate in this context.

**4. Is the goal of increasing minority and female ownership in the broadcast industry to remedy past discrimination a sufficient governmental interest to make the FCC's minority preference policies constitutional? Has there even been a finding that the FCC engaged in discrimination against minorities or women in awarding broadcast station licenses?**

The Commission has consistently stated that the purpose of its minority ownership policies is not to remedy past discrimination but to increase viewpoint diversity. Therefore, a finding that the FCC engaged in discrimination against minorities or women in awarding broadcast station licenses would not be necessary since the Commission has never justified its policies on this basis. In addition, the D.C. Circuit did not require such a finding in order to uphold the minority enhancement credit in West Michigan and Winter Park.

**5. Supreme Court Justice Powell in Regents of the University of California v. Bakke concluded that educational institutions may use race as one of several factors considered in admissions practices to promote academic diversity, a non-remedial goal. Justice Powell, however, stressed that race is only one aspect of a truly diverse student body. As a result, racial set-asides, which do not account for other diversity factors, will not survive constitutional challenge. How do each of the FCC's minority preference policies (comparative licensing, distress sale and tax certificate) stand up under this "diversity" analysis? After the Supreme Court's recent decision in City of Richmond v. Croson, is Justice Powell's "diversity" goal still recognized by the Court as a "compelling government interest" necessary to satisfy the equal protection "strict scrutiny" test?**

In both West Michigan and Winter Park, the D.C. Circuit found that the Commission's minority enhancement credit passes constitutional muster under the diversity rationale enunciated by Justice Powell in Bakke. In particular, these decisions noted that the minority enhancement credit is one of many factors that the FCC takes into account in comparative licensing proceedings.

In Shurberg, the majority panel found that the distress sale policy was not narrowly tailored to remedy past discrimination or to promote programming diversity. Although the D.C. Circuit never ruled directly on whether the policy could stand up under Justice Powell's diversity analysis in Bakke, Judge Silberman found that "the distress sale policy shares the same flaw as the special admissions quota struck down in Bakke" because it is race-determinative rather than based upon a broad range of factors. 876 F.2d at 924-25.

Because the FCC's tax certificate policy has never been subject to judicial challenge, courts have never determined whether it passes constitutional muster under the Bakke diversity analysis. The Commission has discretion to issue tax certificates whenever it is "necessary or appropriate to effectuate a change in a policy of, or the adoption of a new policy by, the Commission with respect to the ownership and control of radio broadcasting stations." 26 U.S.C. § 1071. In fact, the Commission has granted tax certificates in other contexts, such as when multiple owners have sold broadcast stations that were part of prohibited station combinations "grandfathered" under its rules. Therefore, as with the comparative preference policy, minority ownership is only one of the factors that could be utilized in determining eligibility for tax certificates.

The recent D.C. Circuit decisions on the Commission's minority preference policies reflect varying opinions as to whether the diversity rationale survives Croson -- Judges Edwards (in Winter Park) and Wald (in Shurberg) believe that it does, whereas Judges MacKinnon (in Shurberg) and Williams (in Winter Park) believe that it does not. It is worth noting that in upholding the minority enhancement credit, Judge Edwards' majority opinion in Winter Park states that "none of the opinions in Croson expresses any disagreement with Bakke, in which Justice Powell found racial diversity to be a constitutionally permissible goal, independent of any attempt to remedy past discrimination. . . . Accordingly, the constitutional foundation for West Michigan remains intact." 873 F.2d at 354.

**6: How does the FCC reconcile the apparent conflict between the U.S. Court of Appeals' decisions in Shurberg Broadcasting, Inc. v. FCC and Winter Park Communications v. FCC? Does a different constitutional analysis apply to each of the FCC's minority preference policies?**

In Shurberg the majority panel concluded that the distress sale policy is unconstitutional because it is not narrowly tailored to remedy past discrimination or to promote program diversity and constitutes an undue burden

on non-minorities. Judge Silberman specifically distinguished this finding "from the manner in which minority status is taken into account in comparative licensing hearings." 876 F.2d at 925 n.37. Indeed, in West Michigan and Winter Park, the D.C. Circuit found that the Commission's minority enhancement credit is constitutional because it promotes diversification of viewpoints and because minority ownership is but one of several factors the Commission considers under its comparative licensing scheme.

Although the same constitutional analysis would undoubtedly apply to each of the Commission's minority preference policies, the application of this analysis may vary based upon the inherent differences among the policies themselves.

**7. Apart from the constitutional issue, do you support the FCC's minority preference schemes as a matter of policy?**

The Commission supports the goal of increasing minority and female ownership of broadcast facilities. The FCC's policy of giving preferences to minorities and women in the comparative licensing process, along with the tax certificate policy, remain the principal methods by which the Commission attempts to achieve that goal.

**8. The FCC's minority preference policies have been in place for well over a decade, yet the number of minorities and women owners of broadcast stations remains woefully low. Do you have an explanation for that? Is it due to discrimination, lack of adequate financing or some other reason?**

The most direct explanation for the low number of minorities and women owners of broadcast stations is the lack of adequate financing and sufficient capital. Acquiring and operating a broadcast station is a very expensive proposition. It is particularly difficult to obtain the necessary funds without having a track record of ownership and a sizeable amount of money to begin with. First, new entrants in the market typically lack the experience and a track record of ownership that lenders and investors often require. Second, since a potential owner cannot collateralize a license, lenders and investors with little experience in broadcasting are often reluctant to finance enterprises that they cannot readily appraise at full value. Third, even after a minority or female broadcaster has entered the ownership market, financiers prefer to work with multiple station owners. Since it is therefore difficult to obtain financing for just one station, the barriers to increased minority and female broadcast ownership do not end once the first station is purchased. Thus, the problems of financing and capitalization exist at each possible stage of entry into the industry.

**9. The FCC's existing minority preference policies focus primarily on the licensing process and the grant of the initial license. Since over 70% of current owners acquired their stations through transfer, is not that emphasis somewhat misplaced? Since there seems to be agreement that financing and capitalization are two of the greatest obstacles in preventing further gains in minority ownership, should not primary future activity focus on examining ways of removing or substantially reducing that economic barrier to entry?**

The minority preference policies are not limited or even principally directed to the initial licensing process. The tax certificate policy, for example, operates exclusively in the transfer context. Under this policy, a broadcaster who sells to a minority controlled entity is permitted to defer payment of taxes on capital gains that result from the sale. Moreover, investors who provide start-up capital to minority-owned broadcast and cable companies are likewise eligible to defer payment of capital gains tax upon sale of their interests in the company. This policy is integral to the Commission's efforts to encourage minority ownership of broadcast properties.

Notwithstanding the large number of tax certificate related transfers, the minority preference applied in the initial licensing process also remains an essential component of the Commission's efforts to obtain a more diverse pool of broadcast owners. Generally speaking, it takes much less money to start up a station than to purchase one. Thus, if the Commission were to direct efforts away from encouraging minority participation at the initial licensing stage, it would not be taking advantage of one of the easier financial routes toward increased minority and female station ownership.

**10. What alternative or additional policies would you propose to increase minority and female participation in the communications industry? Are any FCC staff resources currently being committed to developing alternative or additional programs for encouraging minority and female ownership in the communications industry?**

We believe one of the keys to increasing minority and female participation in the communications industry is to facilitate acquisition of financing by promoting a better flow of information to prospective minority and female owners, and by encouraging active and continual EEO efforts on the part of existing licensees. The Commission has a number of programs now in place and in the planning stages, which are designed to achieve these goals. For instance, under the auspices of the FCC's Office of Public Affairs ("OPA"), the Commission sponsors and participates in national and regional conferences and seminars on the FCC's minority and female ownership policies, prepares and disseminates news releases, fact sheets and other informational materials on station acquisition procedures and opportunities, and provides guidance and counseling on an individualized basis for potential entrepreneurs. For example, during 1989 the FCC co-sponsored three technical assistance seminars with the National Telecommunications and Information Administration, and one acquisition and management seminar with the Broadcast Capital Fund, Inc., and the Inter-Racial Council for Business Opportunity. Moreover, this year the FCC also sponsored a conference on "Equal Employment Opportunity in the Broadcasting and Cable Industries."

The Commission will continue its efforts to conduct or help coordinate conferences and workshops on the financial, management and technical aspects of ownership of broadcast properties. In addition, the Commission's OPA has begun discussions with agencies of the Department of Commerce to establish an

interagency agreement to increase the federal effort to foster minority enterprise in the telecommunications field.

**11. Could you submit to this subcommittee statistics showing the total number of broadcast licenses awarded to minorities through the application of the FCC's various minority preference policies since 1978? Break out statistics by year and by each of the preference policies. What were the total number of broadcast licenses awarded by the FCC since 1978? Break out statistics by year.**

From 1978 to November 22, 1989, the Commission has approved a total of 38 distress sales and has issued 201 tax certificates in conjunction with the assignment or transfer of radio and television stations. For each year during this time period, the figures are as follows:

| Year | Distress Sales Approved | Tax Certificates Issued |
|---|---|---|
| 1978 | 0 | 4 |
| 1979 | 3 | 12 |
| 1980 | 22 | 10 |
| 1981 | 2 | 15 |
| 1982 | 0 | 15 |
| 1983 | 0 | 10 |
| 1984 | 6 | 11 |
| 1985 | 2 | 17 |
| 1986 | 2 | 16 |
| 1987 | 0 | 31 |
| 1988 | 1 | 32 |
| 1989 | 0 | 28 |
| TOTAL | 38 | 201 |

We are unable to provide statistics showing the number of broadcast authorizations granted through application of the comparative preference for minority ownership. The Commission does not regularly maintain such statistics and the material is not contained in any central source.

We have examined the Commission's grant of construction permits for commercial radio and television stations from 1979 through the present. Since that time, the Commission has issued a total of 2,606 construction permits, which includes grants in both the non-comparative and hearing contexts. The number of construction permits granted, by year, are:

| Year | Total Number of Construction Permits Granted[1] |
|---|---|
| 1979 | 6 |
| 1980 | 88 |
| 1981 | 153 |
| 1982 | 267 |
| 1983 | 335 |
| 1984 | 351 |
| 1985 | 254 |
| 1986 | 222 |
| 1987 | 274 |
| 1988 | 408 |
| 1989 | 248 |

**12. Over the past five years, in how many comparative new proceedings has the "minority enhancement" been the dispositive factor in determining which applicant is awarded the license? Over that same time period how many total licenses were awarded through the comparative new process?**

In many cases, the decisional significance of the minority enhancement is not clear from the integration analysis. In this regard, even if a winning applicant had taken advantage of the minority enhancement, the case may have turned on the interplay of the other comparative factors such as diversification of media ownership, comparative coverage, past broadcast record, or even proposed use of auxiliary power. Therefore, unless a case explicitly states that the decision turned upon minority ownership and participation in station management, it is not clear whether the minority enhancement was dispositive. Most of the cases decided on a comparative basis do not make such clear distinctions. Moreover, it also should be noted that approximately 80% of comparative new cases are terminated by settlement, voluntary dismissal, or other reasons. The comparative criteria, including minority ownership, are irrelevant to the Commission's decision to terminate these cases.

In the past five years, there were 707 grants of construction permits for new commercial radio or television stations through the comparative new process. For each year, the number of grants was as follows:

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1 This data is derived from the Mass Media Bureau's computerized Broadcast Applications Processing System (BAPS) which was initiated in 1978. Data for the years 1979 through 1982 may contain errors due to BAPS' initial entry problems for those years.

| Year | Grants of Construction Permits Through Comparative New Process |
|---|---|
| 1985 | 162 |
| 1986 | 126 |
| 1987 | 138 |
| 1988 | 181 |
| 1989 | 100 |

**13. Is it true that the FCC has in place certain regulatory barriers that may unintentionally discourage minority ownership? For instance, the complex, lengthy and costly nature of the FCC's comparative licensing process imposes economic burdens on minority applicants who do not have the funds needed to withstand this regulatory maze. As part of the FCC's ongoing reexamination of its comparative new licensing process, has an estimate been made as to the amount of money each applicant would save -- in terms of hearing, attorney, engineering and miscellaneous fees -- if a lottery were implemented? If an estimate has not been made, please make such an estimate and provide that information to the subcommittee.**

Although the Commission has in place policies designed to encourage minority ownership, the complexity and economic demands of the comparative licensing process, combined with the difficulty of raising capital to apply for and construct a broadcast station, may, indeed, act as barriers to minority ownership. The Commission, however, is making an effort to remove these barriers. It is currently exploring, in a rule making proceeding, the possibility of making changes to improve the selection process from all avenues, including removing any unnecessary cost barriers. Commenters generally agree that the Commission's comparative hearing process is complex and costly to all applicants due to engineering, legal, filing and hearing fees. Since the issue of how to remedy the complex, lengthy and costly nature of the comparative licensing process is currently under consideration by the Commission, it would be premature to discuss what reforms or action the Commission might ultimately take.

The Commission has not estimated the savings applicants can expect to realize if a lottery were implemented. In 1985, however, the Commission released a guidebook on applying for new FM stations in which it estimated that the legal fees alone in the comparative hearing process can range from $25,000 to in excess of $100,000. In its rule making proceeding on the comparative hearing process, the Commission discussed one case that settled after an initial decision in which reimbursement of application and hearing-related costs to one applicant amounted to $347,576, of which $313,950 was for legal expenses. In response to the Notice, one commenter asserted that its legal, engineering, filing and hearing fees have ranged from $60,000 to $200,000.

**14. I recognize that the FCC's minority preference policies may be, at times, abused to benefit and enrich persons other than the intended minority and female beneficiaries. In the past there have been allegations that applicants have, in some instances, attributed ownership interests to minorities and**

**females who have no real interest in the application or erected the facade of a business organization to conceal the true ownership or control of the applicant. What steps (in addition to those identified in your testimony before the subcommittee) could be taken to tighten up the FCC's current minority preference policies to avoid sham arrangements?**

The recent amendments to Form 301 and the limitations on settlements in the license renewal context, referred to in my testimony before the Subcommittee, are the most significant and potentially effective steps taken by the Commission to eradicate sham and non-bona fide applicants. Under the new Form 301, all applicants will be required to (1) specify the date and location of the filing of the applicant's enabling charter (if the applicant is a non-individual); (2) identify all equity owners in the applicant, including general and limited partners and voting and nonvoting shareholders; and (3) disclose any future ownership rights in the applicant. The applicant is also required, much earlier in the application process, to identify and correct its integration proposal. These changes are specifically intended to prevent applicants from setting up minority or female fronted corporations or limited partnerships to gain an integration preference in a comparative licensing proceeding. The new reporting requirements will enable parties to comparative hearings to identify the real parties-in-interest in the applicant, and thereby expose these shams. If the Commission determines that a sham partnership or corporation has been erected merely to obtain a preference in a comparative hearing, the Commission will deny the preference.

As noted in my testimony, the Commission has also adopted limitations on settlements of competing applications and petitions to deny in the license renewal context. Although not aimed per se at the filing of sham applications, these measures should prove helpful in reducing the filing of competing applications by insincere or non bona fide applicants. In fact, although it is still too early to draw determinative conclusions from this data, no competing applications were filed against four groups of approximately 2400 renewal applicants against which competing applications were due after the effective date of the new rules. (In contrast, 22 competing applications were filed against approximately 2400 stations prior to the new rules.) The Commission has also solicited comment on the possibility of adopting settlement limitations in the new licensing context.

We believe it is advisable to determine whether these recent reforms, particularly the Form 301 amendments which are aimed directly at eradicating sham applicants, will be effective before proposing additional steps to avoid sham arrangements. Commenters in the new licensing proceeding have urged the Commission to consider letting equity alone determine ownership for purposes of applying an integration preference in order to reduce sham applicants. The Commission has traditionally been concerned that such a step might prevent legitimate applicants, especially minorities and women, from using limited partnership arrangements to raise capital to construct and operate broadcast stations. Nevertheless, the Commission will have the opportunity to examine this proposal fully in the proceeding. In the meantime, it is hoped that the new Form 301 reporting requirements and settlement limitations will

substantially reduce the filing of sham applications without restricting legitimate minority applicants from obtaining integration preferences they deserve.

**15. How does the FCC define "minority programming"? Can you provide some examples of "minority programming"?**

The purpose of the Commission's minority preference policies is to increase minority ownership as a mechanism for increasing viewpoint diversity. The Commission does not analyze the programming of a station, which received its license through operation of our minority preference policies, to determine if the goal of diversity is actually accomplished.[2] Rather, the Commission's primary concern is to ensure that the broadcaster has met its fundamental obligation of providing programming in response to community needs and interests.

I would note, however, that in comparative hearings for new radio and television stations, questions involving what may be considered "minority programming" have arisen in two very limited contexts. First, while programming proposals by applicants for new stations are rarely a basis for comparison, hearing issues have been added on a few occasions to determine if an applicant should receive a preference for proposing a specialized program format such as Spanish language programming. Second, in a very few cases, the Commission's Review Board has permitted non-minority applicants to demonstrate their special sensitivity to minority viewpoints in an attempt to offset a competitor's minority enhancement credit for integration. Although these cases indicate that such showings could consist, inter alia, of past and proposed programming directed at minority needs and interests, they do not specifically define minority programming. Moreover, the full Commission has never addressed such an issue and has not indicated whether it should be a comparative factor in hearings for new radio or television stations.

**16. How does the FCC define "female programming"? Can you provide some examples of "female programming"?**

As with the term "minority programming," the Commission has not developed a specific definition for the term "female programming" because it is not necessary for the Commission to define this term in order to administer this preference. The purpose of the female preference is to increase female ownership in order to promote viewpoint diversity. The Commission's primary concern is to ensure that the broadcaster has met its fundemental obligation to provide programming responsive to community needs and interests.

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2 Moreover, the Commission raised this issue in a broad inquiry to examine its minority preference policies, but was prohibited by Congress from pursuing the inquiry.

**17. How is "Minority Control" defined by the FCC?**

For purposes of the Commission's tax certificate policy, "minority control" exists where more than 50 percent of the voting stock is owned by a minority if the buyer is a corporation, or, in the case of a limited partnership, the general partner or partners are minorities and own more than 20 percent of the purchasing entity. However, it is not necessary to consider whether "minority control" exists for purposes of implementing the minority enhancement in comparative hearings. Rather, an applicant will receive quantitative credit to the extent that its owners will participate full-time in station management positions, and this may be enhanced qualitatively to the extent that these integrated owners are minorities, without regard to whether these individuals control the applicant.

Senator INOUYE. Thank you very much, Mr. Porter.

It has been suggested by some—and the panel also alluded to this—that the implementation by the Commission of the minority ownership policies have resulted in a large number of sham or minority front applications. Is that your observation also?

Mr. PORTER. Well, certainly, Senator, the Commission's position is that the process should be open to all legitimate applicants.

However, in the last several years information certainly has come to the Commission's attention that the process has not been always utilized as intended; that, in fact, there are applicants that are sham applicants. That, in fact, there are instances where the Commission's processes are being abused in a manner contrary to the original intention and the Commission is very concerned about sham applications.

It is very concerned about abuse of its processes. And, indeed, as recently as 1989 as a result of the Commission's concern in this area, it changed a number of its processes.

In the 301 application, for example, where applicants specify their interest in a new AM station, a new FM station or a new T.V. station, the Commission changed the financial qualifications standard.

Previously, an applicant merely had to come in and certify that it was financially qualified.

As a result of the Commission's concern with sham applications and abuse, the Commission decided to return to a standard employed earlier whereby an applicant has to specify that it has sufficient net liquid assets to construct and operate the station for a period of three months without recourse to revenue.

Now, that is a far tougher standard that an applicant has to meet today, and that was effective in 1989, than applicants previously had to meet.

We believe that that is one factor that may deter sham applications and abuses.

In addition, the Commission made a change in the 301 application form so that applicants now have to identify individuals whose interests fall in the category of nonattributable interests.

The concern here was that applicants for comparative purposes might try to utilize a general partner or some other attributable interest to obtain a comparative advantage while keeping control, either presently or future control in the hands of a nonattributable interest.

So, we require now that applicants identify all of the nonattributable interests, and they also must disclose to the Commission whether or not there are any contracts, agreements or understanding between the attributable interests and the nonattributable interests relating to future relationships between the two after an award is made by the Commission.

In addition to the 301 area, the Commission took steps in the comparative renewal proceeding, again directed towards its concern with sham applications and abuse of the Commission's processes.

Specifically, the Commission now bans all settlement payouts before an initial decision. After an initial decision in a comparative

renewal context, the most that a withdrawing applicant can receive is legitimate and prudent expenses.

The idea here was for the Commission to take away the profit incentive for filing applications specifically——

Senator INOUYE. Do you apply that to new stations, too?

Mr. PORTER. That is not applied to new stations.

Senator INOUYE. Why do you not apply it to new stations?

Mr. PORTER. In the comparative new proceeding, which is an open docket at this point, we specifically ask for comments from the parties as to whether or not changes should be made in the settlement area, which is the area that parties use to obtain these payouts.

That is an area that the Commission will examine specifically before making an ultimate determination in the comparative new proceeding.

Senator INOUYE. I see.

Well, I am impressed with the steps that have been taken.

What if Mr. A is involved in a sham application and you find out that he is involved, and so he is turned down.

If Mr. A should come at another time and make another application, how do you treat Mr. A? Is he put on a list?

Mr. PORTER. We do not have a list, per se.

However, the Commission relies in large measure on a number of factors to bring these matters to our attention.

Typically, what happens in the comparative situation is you have a number of applicants that are very active in reviewing the history of any particular competing applicant, and we rely on them to bring the matter to our attention.

In addition, when we are parties in a proceeding, we have access to the application, and in the application the applicant would be required to indicate whether or not it had previously applied for a station before the Commission, and that would give us sufficient information to find out what had happened to that application.

As a result of that review, if we find that there is an unlitigated question as to whether or not this particular applicant filed a sham application, it would be appropriate for either the bureau or the parties to file a petition to add an issue against this particular applicant to litigate the question that we could not litigate before.

So, even though there is not technically a list, there are numerous ways for the matter to be brought to the Commission's attention and explored.

Senator INOUYE. I may be submitting to you questions of a technical nature requesting data and such, and I hope you can respond to them, sir.

Mr. PORTER. We will respond to that, Senator.

Senator INOUYE. Thank you.

Senator Burns.

Senator BURNS. I have just a couple of questions, I guess.

In the past the FCC has stressed the need for establishing an empirical nexus between minority ownership of broadcasting facilities and diversity of programming to make the preferences constitutional.

Mr. Porter, in your view, that nexus, is that necessary, do you think, at this juncture of the law or has such an empirical nexus been established?

Mr. PORTER. Well, Senator, for years the Commission proceeded on the assumption that there was a nexus, and the court had the same assumption.

The only time the issue really came up was as a result of court litigation.

The court specifically asked us questions which we felt we could not answer without compiling a factual record.

Now, to the extent that this is a matter which comes up only as a result of court concern, I do not believe the Commission believes it is necessary to establish such a factual nexus as a prelude to enforcing our policies.

I think our policies will continue absent some unusual circumstances where we are requested to establish a factual record.

Senator BURNS. I have a couple of other questions, and they are sort of on a technical matter, too, Mr. Chairman, and we will forward those to you and visit with you about those.

Mr. PORTER. Thank you, Senator.

Senator INOUYE. Thank you very much, Mr. Porter.

And now may I call upon the last panel, Mr. John Payton, Esquire, Mr. William E. Kennard, Esquire, Dr. Marilyn Fife, Dr. J. Clay Smith, Mr. Richard Ramirez, and Mr. Alan Shurberg.

May I first call upon Mr. John Payton.

## STATEMENT OF JOHN PAYTON, ATTORNEY

Mr. PAYTON. Good morning, Mr. Chairman and Senator Burns.

Let me first tell you who I am not. I have to correct the record, I am afraid. I am not a partner at Verner, Liipfert. I am a partner in a law firm in Washington, D.C., Wilmer, Cutler & Pickering.

I am here in my individual capacity, though. I did not intend to identify myself that way until I felt I had to.

Senator INOUYE. The record will be corrected.

Mr. PAYTON. I am here, I believe, I have handled a number of cases that have raised questions about the use of race-based measures to remedy discrimination, including the Croson case which I think is probably the reason we are all here today. I represented Richmond in the Supreme Court, and I have also handled a number of other cases that involve federal race measures.

My written testimony goes into considerable detail with regard to where things stand now and where I think things ought to go. I do not intend to reprise all of that.

I want to discuss primarily what diversity is and whether or not it is a goal that should be embraced by the Congress and which would be authorized by the Constitution in light of the cases that bring us here today.

We have heard about the present underrepresentation of minorities in broadcasting. There is no question about that.

I think that that is attributable to decades and decades of discrimination that we are all familiar with, probably more familiar with than we like, but it is still with us.

Diversity is one of the great strengths of this country. Racial, ethnic, cultural differences are part of things that make this country a rich country and a great country.

Unfortunately, one of the effects of the discrimination that causes there to be an underrepresentation of minorities as owners of broadcast facilities and cable franchises is that their diversity; that is, those minorities who are the victims of that type of discrimination, those minorities do not have the opportunity to have their viewpoints come out over the airwaves or through cable.

That is a great loss to all of us, and it is a great loss to our country as a whole; it is a great loss to the media themselves. That is the goal that I think the Congress ought to focus on.

And let me just step back a little bit to restate what that goal is. That is a goal that relates to remedying the effects of past discrimination, not just a goal that says that we ought to have some proportional representation among ownership of media enterprises because the reason we do not have but 2 percent minority ownership among the media is attributable to past discrimination.

The benefit that has been suffered by the country because of this is not just that Percy Sutton did not have a radio station until the 19—whenever it is.

The benefit that is lost to the country is that we all did not have the benefit of the different viewpoint that he would have brought to the airwaves and to television and to cable. And to that extent, it is a much broader concern because there is a much broader effect on all of this with regard to why it is not just good enough to say right now.

If there is no discrimination going on in the actual sale of stations, I think there is another context that has to be taken into account and that is that the majority of all the licenses that have been issued by the FCC were, in fact, issued long ago and were issued well before the policies that are at issue today were, in fact, in place, prior to 1978 or prior to 1963 the licenses were issued. They are out there.

There has been some increment since then of new licenses, but not a lot, and the best VHF T.V. stations, for example, the best frequencies in the best cities, the cities that have the largest markets, those were all already allocated.

So, there is a problem of there being mature industry. And when Mr. Sutton says that he tried to buy a station in 1940, one of the reasons he is saying there is a tax on him is that the best stations were already allocated.

And if you want to buy it now, right, you have to pay whatever the appreciated value is as opposed to competing for it in 1940 when that was not the case. It is not just inflation he is talking about. It is the fact that we have a mature industry.

What is the diversity that is being sought here?

There has been a discussion, and there are some studies about minority programming as part of the diversity, and I would suggest that the diversity that is being sought is much broader than that because it relates to exactly what happens on the station and every aspect of the station, not just the selection of minority programming, but a selection of nonminority programming.

I think that common sense and our experience tell us that minority group members have different viewpoints on a number of different subjects. Poll after poll after poll shows very divergent responses to the same questions, minority versus nonminority.

It is not that all minorities have the same views. They do not. But there are different views that arise in minority group members. And by having them own stations, you will see reflected different choices with regard to programming that is minority and nonminority that relates to news, that relates to editorial viewpoints that relates to advertising, that relates to how the station would interact with the community, both communities, all communities.

That diversity is far broader, far richer and far more important than to simply, I think, narrow the focus to is there minority programming. It is a broader concern than that.

Now, it is true that minority owners have to survive in the same marketplace, and none of these policies do anything to help someone actually survive out there once they get a station. They make it on their own.

But, in surviving in the real world out there, there are always choices to be made. Should I run this programming or that programming? Who should I hire as my general manager? Who is in charge of advertising? Who is in charge of news? Who is in charge of community relationships? All those things matter.

Minority owners, I think, that take active roles make dramatic differences. I think minority owners that do not take active roles, still make dramatic differences.

I think there is no doubt that if you simply replace the owner of a T.V. station with a minority group member, you will see differences in the station. People will act differently. They will respond to what they think they now should be sensitive to. They will make decisions about programming that they would not have considered even being choices before then. There are dramatic impacts.

Now, some of this operates in subtle ways. That is, when someone decides without any prompting to decide to do this as opposed to that. So, it may function in subtle ways.

The effects of how it functions are quite dramatic, though. There is no doubt, it seems to me, of the effect. Even if you cannot say well, exactly how did that decision come about, it is hard to get at that. I do not think it is hard to get at the fact the decision changed.

Now, where does all of this exist given the Supreme Court's decision in the *Croson* case?

The *Croson* case did make it more difficult for cities and states to use race-based measures—to use the phrase in the opinion—to use race-based measures to ameliorate the effects of past discrimination in the opportunities for minority groups. That is a quote from the opinion.

It means that cities and states have to make particularized findings, and they have to have narrowly tailored remedies.

But, there are two points that are very crucial here. That related to cities and states, OK, and with regard to what Congress can do, first the court made it clear that Congress has the greatest power of all and that Congress, unlike cities and states, can make deci-

sions and take legislative actions on the basis of society-wide discrimination as opposed to the restrictions that the court is placing on cities and states.

You have more power with regard to what you can look at and what you can seek to remedy, and I think you have more power and more discretion with regard to how you go about crafting your remedy.

That is not to say that you do not have to make findings. You do, and I think you must.

It is not to say that you should not try to narrowly tailor it. I think you do, but you have more discretion in both areas.

I think it is important that you take some legislative action here because otherwise we are just left in limbo with regard to these policies.

Finally, I think it goes without saying that radio and television and now cable have become overwhelming influences in our society, and this has crept up on us all rather suddenly.

Everyone in the country has a T.V. and a radio. Everyone in the country listens to some form of it. And I think that in our democracy communication is absolutely vital, and the diversity is as important a factor in how our democracy works as anything else.

I think it is incumbent upon you to do whatever is necessary to see that fairness takes place in that marketplace.

[The statement follows:]

Testimony of John Payton

Before the United States Senate
Committee on Commerce, Science and Transportation
Communications Subcommittee

September 15, 1989

Mr. Chairman and Members of the Subcommittee:

I am John Payton, a lawyer in private practice here in Washington, D.C. In the last several years I have been involved in defending a wide range of legislation that was designed to remedy the effects of racial discrimination by means of race-based measures. I represented Richmond in the City of Richmond v. Croson, before the Supreme Court, the case that is largely responsible for us being here today. I presently represent a number of local governments in connection with their efforts to comply with the requirements of Croson. Prior to that case, on behalf of the National Lawyers Committee for Civil Rights Under Law, the Washington Lawyers Committee for Civil Rights Under Law, the Minority Business Enterprise Legal Defense and Education Fund, and the Washington Area Construction Industry Task Force, I have either intervened or filed amicus briefs in such litigation. These efforts sought to defend federal as well as local programs, and have been in federal district and circuit courts.

And, I should tell you, my firm represents Cook Inlet Region, Inc., whose President, Roy M. Huhndorf is also testifying before you today.

My testimony is presented on my behalf only and nothing I say should be attributed to my firm. I welcome this opportunity to address the Subcommittee on this important and timely issue.

## Introduction

Society-wide discrimination has resulted in a disturbing underrepresentation of minorities in radio and television, and accounts in large part for the fact that while minorities are some 23% of our population, they own only just over 2% of the radio and television stations and a much smaller percentage of the cable franchises in the country.1/ The effects of this discrimination are not limited to those numbers. In fact, the more significant consequences have been to the radio and television media themselves, and to the country as a whole. Society-wide discrimination has led to the virtual absence of the diverse and rich viewpoints that minority owners could bring to the electronic media -- which media have indisputably become our dominant and

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1/ See National Association of Broadcasters, Minority Broadcasting Facts 6 (1986); Minority Ownership of Cable Television Facilities, 52 Rad. Reg. 2d (P&F) 1469, 1471 (1982).

pervasive means of communication -- and we are all that much poorer for it.

## I. The Need for Legislation

### A. The Current Minority Preference Policies

For more than a decade, the FCC and the Congress have sought to address the paucity of minority ownership through three policies that directly encourage the acquisition of broadcasting licenses and (more recently) of cable franchises by members of racial minority groups. First, the FCC has treated minority ownership and participation as a factor enhancing an applicant's chance to prevail in a comparative contest for a broadcast license,2/ and Congress has mandated a similar approach when the FCC distributes mass media licenses by a system of random selection.3/ Second, broadcasters whose right to a continued license has been placed in serious doubt because of alleged misconduct have been allowed to sell their stations to members of minority groups in "distress sales" as an alternative to prosecuting the misconduct question to a conclusion.4/ And third,

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2/ See, e.g., West Michigan Broadcasting Co. v. FCC, 735 F.2d 601 (D.C. Cir. 1984), cert. denied, 470 U.S. 1027 (1985).

3/ See 47 U.S.C. § 309(i)(3)(A) (1982).

4/ See Minority Ownership of Broadcasting Facilities, 68 (continued...)

the FCC has granted certificates that confer tax benefits on those who sell broadcasting stations or cable systems to members of minority groups, thereby enhancing the competitiveness of the potential minority purchaser.5/

B. The Recent Court Decisions

We are here today because of the questions about the validity of these three programs raised by recent court decisions. The most prominent of these, of course, is City of Richmond v. J.A. Croson Co., 109 S. Ct. 706 (1989), in which the Supreme Court held that racial preferences granted by state or local governments violate the Fourteenth Amendment's ban on governmental discrimination unless they are narrowly tailored to meet a compelling public interest. Then, in the wake of Croson, the U.S. Court of Appeals for the District of Columbia Circuit decided Shurberg Broadcasting, Inc. v. F.C.C., 876 F.2d 902 (D.C. Cir. 1989). In Shurberg, a divided three-judge panel, applying Croson, held that the FCC's distress sale policy unconstitutionally discriminated against a white-owned enterprise that sought the license being transferred. But shortly thereafter in Winter Park

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4/ (...continued)
F.C.C.2d 979 (1978). The policy only applies when no competing application has been filed.

5/ See id.; Minority Ownership of Cable Television Facilities, 52 Rad. Reg. 2d (P&F) 1469 (1982).

Communications, Inc. v. F.C.C, 873 F.2d 347 (D.C. Cir. 1989), another divided panel of the same court upheld the comparative hearing enhancement against a similar constitutional attack. The D.C. Circuit as a whole has declined to review Shurberg and Winter Park but it is likely that the Supreme Court will be asked to review one or both of them.

Two of the central disputes in Shurberg and Winter Park are (1) whether and to what extent Congress has mandated the FCC's actions, and (2) whether Congress had adequate ground to require race-conscious action by the FCC. A majority of the Supreme Court made clear in Croson that the unique powers of Congress give it much greater leeway to engage in race-conscious action than state or local governments. The majority in one panel decision by the District of Columbia Circuit, and a dissent in another, questioned the FCC's minority ownership policies, asserting that Congress has not unequivocally required those policies and that, even under the broader standards applicable to Congress, there is no factual record adequate to sustain race-conscious action.

C. The Need for a Congressional Response

I think this issue is far too important to leave under the present cloud of unconstitutionality. The minority ownership policies have been working. In 1978, less than 1% of all

broadcasting licenses were in minority hands.6/ The difference between that figure and today's 2% plus is real and important. Now is not the time to hazard a halt to that progress for lack of clear, unequivocal and adequately based congressional action.

This is not to say that the minority ownership policies should not be reviewed or adjusted where appropriate, or that the demand for strict scrutiny of any and all race-conscious programs is inappropriate. I do not urge a knee-jerk reaffirmation of everything that has been said or done in this field. I do urge that, when you give the matter a close look, you will find the core of the minority ownership policies sound.

II. The Purpose of the Minority Ownership Policies

It is important to be clear at the outset about the purpose of the policies in question. There has been considerable discussion in judicial opinions and elsewhere about the difference between race-conscious programs that are "remedial" and those that are not. In the eyes of some, a "remedial" program seeks to remedy a wrong. It compensates victims of racial discrimination for the wrongs done to them and therefore requires both findings of discrimination and a remedy tailored to the compensation of

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6/ See Minority Ownership of Broadcasting Facilities, 68 F.C.C.2d at 981.

identified victims. Justice O'Connor's statement in Croson that racial preferences should be "strictly reserved for remedial settings" has thus been taken to mean that racial preferences should be limited to those that compensate identified victims for past or present wrongs.7/

On the other hand, a "nonremedial" racial preference is thought to have nothing to do with wrongful conduct. It looks solely to the accomplishment of some future good. Justice Powell's opinion in Regents of University of California v. Bakke, 438 U.S. 265 (1978), which affirmed the right of a state medical school to take the race of applicants for admission into account as a factor making for a desirable diversity in the student body, is viewed as exemplifying the nonremedial approach,8/ and Justice Stevens is viewed as the primary current exponent of that approach on the Supreme Court.9/

In my view, any rigid distinction between these approaches is too simplistic to be tenable. We are where we are

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7/ See Shurberg, 876 F.2d at 919-20 (opinion of Judge Silberman).

8/ See Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 286 (1986) (O'Connor, J., concurring) (discussing Justice Powell's opinion in Bakke).

9/ See Croson, 109 S. Ct. at 731 & n.2 (Stevens, J., concurring); Wygant, 476 U.S. at 313-15 (Stevens, J., dissenting).

in this country on the subject of race largely (but by no means wholly) because of the past. One principal reason for singling out particular minority groups for special treatment is that past (and sometimes present) discrimination against them has continuing effects we wish to change. But those effects are not limited to the harms done to identifiable victims. They include the harm done to society at large by the lingering barriers to full participation of racial minorities in a wide range of American institutions -- barriers which, while largely traceable to past discrimination, deprive minorities of opportunities and the public of the contribution that those minorities could otherwise make today.

Nowhere is this point more evident than in connection with broadcasting and cable media, which are collectively present in virtually every American household and with which most Americans spend a substantial portion of their waking hours. The barriers to minority participation in ownership and control of those media deprive the public of the special contribution to the diversity of thought and perspective that minority ownership on more than a token scale can make.

The purpose of the minority ownership policies, as I understand them, is thus remedial and nonremedial at once. Those policies seek to overcome the continuing effects of past

discrimination. But they do so for the forward-looking purpose of securing a greater expression of, and sensitivity to, minority viewpoints and perspectives in the service that broadcasting and cable media render to the public. That purpose, I believe, can be achieved in full conformity with the Constitution. I also believe that this is true even under strict scrutiny, the most rigorous standard of constitutional review, a standard that the Supreme Court has never even applied to federal affirmative action programs.10/

III. The Constitutional Standard

Much attention has been given to the fact that Croson marked the first time in which a majority of the Supreme Court adopted strict scrutiny in the affirmative action context, and that therefore now, "benign" racial preferences that are designed to remedy discrimination are ostensibly treated the same as "invidious" classifications that discriminate against minorities. While I believe, as do the Croson dissenters, that the adoption of strict scrutiny is "an unwelcome development,"11/ Congress must not be unduly deterred from taking race-conscious action when it is necessary to do so. Whether we like it or not, some effects of

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10/ See Croson, 109 S. Ct. at 717.

11/ Id. at 752 (Marshall, J., dissenting).

racial discrimination can only be effectively addressed by remedies that take race into account.

Croson hardly sounds the death knell for the use of remedial racial preferences. Granted, when the Court has subjected a legislative classification -- racial or otherwise -- to strict scrutiny, the maxim "strict in theory and fatal in fact" has often rung true. But in adopting strict scrutiny in Croson, the Court did not intend to go that far. Indeed, the principal opinion of the Court, authored by Justice O'Connor, makes plain that if the constitutional ground rules are satisfied -- in other words, if the strict scrutiny components are met -- then remedial racial preferences will be upheld. In attempting to comply with those ground rules here, two points should be kept in mind.

First, the Court in Croson declared that the constitutional ground rules are less stringent for the remedial racial preferences enacted by the federal government than for those enacted by state and local governments. Relying on and reaffirming Fullilove v. Klutznick, 448 U.S. 448 (1980), which had upheld a congressionally-mandated remedial preference for minority contractors, Justice O'Connor's opinion could not have been more clear: Congress possesses "unique remedial powers" that enable it to use racial preferences where states and cities cannot. Croson, 109 S. Ct. at 718. Even Judge Silberman, the author of the lead

opinion in Shurberg, conceded that "Congress is clearly the institution with the most latitude to make findings of discrimination and authorize remedies on the basis of the evidence before it."12/

Second, Croson does not fatally undermine the nonremedial aspects of the minority ownership policies. To the contrary, as 30 of the country's leading constitutional scholars (including 11 law school deans) concluded, "the positive educational value of assuring racial diversity and facilitating multiracial experiences" survives Croson.13/

A. The Components of Strict Scrutiny

Strict scrutiny requires racial preferences to be supported by a factual predicate that gives rise to a "compelling interest." In addition, it requires that such preferences be "narrowly tailored" to ensure that the preferences fit that interest. The "compelling interest" inquiry addresses whether the ends of a particular preference are permissible. If the ends are permissible, the "narrowly tailored" inquiry focuses on whether the means selected to achieve the ends are reasonable.

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12/ Shurberg, 876 F.2d at 912 (opinion of Judge Silberman).

13/ Constitutional Scholars' Statement on Affirmative Action After City of Richmond v. J.A. Croson Co., 98 Yale L. J. 1711, 1713 (1989).

The distinctions that Croson drew between federal and state power to use racial preferences mean that even under strict scrutiny, Congress retains a fair amount of discretion. To put this in terms of the two components of strict scrutiny, first, the broader federal authority allows Congress to establish the factual predicate for its racial preferences -- the "compelling interest" component -- without making findings of the same degree of precision and specificity as states and their subdivisions. Second, in analyzing whether a federal racial preference is "narrowly tailored" to achieve a compelling interest, courts will pay more deference to Congress' selection of the means to the ends of its racial preferences than they would to the choices of state and local governments.

B. Compelling Interest Analysis

1. Need for Congressional Findings Regarding Remedial Justification for FCC Minority Preferences.

The compelling interest analysis in Croson illustrates the sharp dichotomy between federal and state powers to enact remedial racial preferences. In examining the factual predicate of the plan at issue in Croson, the Court said that local government officials could use a racial preference only if they

had evidence of identified discrimination in a particular industry within their jurisdiction. Mere societal discrimination against minorities is an insufficient factual predicate.

By contrast, the Court admonished that Congress "may identify and redress the effects of society-wide discrimination." 109 S. Ct. at 719 (emphasis added). This reiterated the holding of Fullilove nearly a decade earlier. In that case, the Court deemed it unnecessary for Congress to have had before it evidence of identified instances of racial discrimination in the national construction industry.

I do not intend to imply that in authorizing remedial racial preferences in broadcasting, Congress need make no findings whatsoever and can simply take legislative notice of our nation's sordid history in race relations. Instead, it should, as Judge Silberman explained, base its action on "some quantum of particularized evidence of the effects of societal discrimination in [the broadcasting] industry." Shurberg, 876 F.2d at 915 (opinion of Judge Silberman) (emphasis added).14/

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14/ See also Milwaukee County Pavers Ass'n v. Fiedler, 710 F. Supp. 1532, 1541 (W.D. Wisc. 1989) (Croson and Fullilove "should be read to require some congressional findings of past discrimination").

Applying this evidentiary standard in Shurberg, Judge Silberman claimed that neither the FCC nor Congress had sufficient evidence on which to predicate the distress sale policy as a remedial measure. According to Judge Silberman, the policy was supported only by statistics purporting to show minority underrepresentation in broadcasting.15/ Since the same statistics underlie the comparative hearing enhancement and the tax certificate program, Judge Silberman would presumably say that, as remedial measures, those preferences have the same evidentiary deficiency as the distress sale policy. Indeed, Judge Williams found such flaws with the comparative hearing preference in his Winter Park dissent.16/

My own view of the evidence of past discrimination in Shurberg and Winter Park differs from those of Judges Silberman and Williams. Be that as it may, Congress should develop more explicit links between the statistics evidencing minority

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15/ See Shurberg, 876 F.2d at 915 (opinion of Judge Silberman).

16/ See Winter Park, 873 F.2d at 365 (Williams, J., concurring in part and dissenting in part). The majority opinion in Winter Park did not address the constitutionality of the comparative hearing enhancement as a remedial measure because the FCC had not argued to the court that the preference was a "cure [for] the effects of perceived racial discrimination." Id. at 353 n.6.

underrepresentation in broadcasting and "the larger phenomenon" of society-wide discrimination.17/

In so doing, we can be guided by what the Court thought Congress did right when it enacted the contracting preference upheld in Fullilove. There, Congress was said to have had a compelling interest because there was sufficient evidence from which it could conclude that the underrepresentation of minorities in public contracting was "from the existence and maintenance of barriers to competitive access which had their roots in racial and ethnic discrimination." Fullilove, 448 U.S. at 478 (plurality opinion) (emphasis added). This evidence went well beyond the "amorphous" societal discrimination that is "ageless in its reach into the past."18/ Instead, the evidence underlying the contracting preference in Fullilove highlighted pervasive and systematic effects of societal discrimination in an isolated, discrete industry. Likewise here, Congress can draw on ample available evidence documenting that society-wide discrimination has created pervasive and systematic barriers to competitive access for minorities in the ownership of radio and television media.

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17/ Shurberg, 876 F.2d at 914 (opinion of Judge Silberman).

18/ Croson, 109 S. Ct. at 723 (quoting Bakke, 438 U.S. at 307 (opinion of Powell, J.)).

a. Barriers to Entry of Minorities

The FCC has determined that the central barrier to entry into broadcasting is an economic one, the need for substantial risk capital.19/ This barrier in turn has had a disproportionate affect on minorities that is largely attributable to the entire range of racial discrimination. In any event, however, a disproportionate percentage of minorities lack the experience and track record in managing substantial enterprises that would provide them with access to capital. In the final analysis, moreover, control over an enterprise lies with those who supply significant portions of the capital at risk. And most minorities, even those relatively well-off, simply do not have such capital. It is such barriers that account for the low percentage of minority participation in all industries, not just broadcasting.

I call to your attention some of the more remarkable findings in a highly publicized survey that summarizes and interprets a large body of data concerning the plight of black Americans. That survey, entitled A Common Destiny: Blacks in American Society (1989), published only this summer, shows that, "[o]verall, the net worth position of black households is very

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19/ Amendment of Section 73.3555, 100 F.C.C.2d 17, 19-20 (1984).

limited in comparison with whites," in large part, because "more black families have been persistently, not just temporarily, poor . . . ." Id. at 294.20/ In terms of comparative business performance, the study observed that "black businesses [are] primarily small-scale enterprises concentrated in a narrow range of low-revenue activities." Id. at 180. As late as 1969, the study shows, 94% of black businesses were sole proprietorships and 84% had no paid employees, id., while as recently as two years ago, black-owned businesses had only 1/3 of 1% of total U.S. sales. Id. at 181.21/

Not all minority ethnic groups have fared as badly. Asian Americans (and particularly Japanese and Chinese) are often held out as "model minorities" who, despite massive discrimination, have outstripped the majority in levels of income and education. But that success has come only in the decades since 1950, and even today they face significant barriers to economic achievement beyond a sheer lack of financial capital.

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20/ The comparative household net worth of Hispanics is also far below that of nonminority Americans. See Statistical Abstract of the United States 1989, Table 747.

21/ As of 1982, exactly the same proportion of Hispanic-owned enterprises (84%) had no paid employees. See 1982 Survey of Minority-Owned Business Enterprises (Bureau of the Census, MB82-2), Tables 1 and 8. Some 89.4% of the 13,000 odd business enterprises owned by Native Americans (Aleuts, Eskimos and American Indians) had no paid employees. 1982 Survey of Minority-Owned Business Enterprises (Bureau of the Census, MB82-3), Table 1.

The overwhelming majority of Asian-owned business enterprises are small. In 1982, 81% had no paid employees.22/ Some 67% of those with paid employees had less than five.23/ Plainly, Asian Americans have not yet been able to join the mainstream of American business.24/

While there are undoubtedly a wealth of factors underlying these patterns, the continuing effects of racial discrimination play a central role.25/ Indeed, Congress so found when it enacted the minority set-aside program upheld in Fullilove. And it is likewise apparent that those effects account

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22/ See 1982 Survey of Minority-Owned Business Enterprises (Bureau of the Census, MB82-3), Table 1. The figures for Japanese-owned and Chinese-owned enterprises were 73.3 % and 86%, respectively. Id. In contrast, 68% of all business enterprises had no paid employees. Statistical Abstract of the United States 1986, Tables 874 & 876; County Business Patterns, 1982: U.S. Summary (Bureau of the Census).

23/ See 1982 Survey of Minority-Owned Business Enterprises (Bureau of the Census, MB82-3), Table 8, for data on enterprises owned by Asians, American Indians and Pacific Islanders as a whole. Asian-owned enterprises accounted for at least 85% of the total (see id., Table 1). For the country at large, enterprises with less than 5 employees were 53.7% of those with paid employees. See County Business Patterns, 1982: U.S. Summary (Bureau of the Census).

24/ See Daniels, Asian America 317-44 (1988).

25/ See A Common Destiny, at 5 (the "legacy of discrimination and segregation" continues to affect attempts by black Americans to "remov[e] barriers" to competitive access).

for the negligible percentages of minority ownership in the broadcasting and cable media.

And these economic patterns are by no means the only legacy of discrimination. Political participation, housing, education, health care, as well as the aspirations and self-concept of minorities and nonminorities were and are affected by society-wide discrimination. Discrimination is a complex and pervasive factor in all of our lives.

It cannot seriously be argued that the low percentage of minorities in radio and television ownership is by their choice -- that racial minorities are disproportionately attracted to fields other than broadcasting and cable.26/ In fact, minority ownership percentages in all industries are low.27/ Only in Transportation and Public Utilities, Retail Trade and Services did minorities account for more than 5% of the total in 1982,28/ and the attraction of those fields plainly stemmed primarily from low

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26/ Judge Silberman made such a suggestion in Shurberg. See 876 F.2d at 915 (opinion of Judge Silberman).

27/ As of 1982, minority-owned enterprises constituted 5.8% of the country's 14,546,000 business units, 2.8% of the 4,633,960 with paid employees and 1.3% of the 2,146,924 with 5 or more paid employees. See the sources cited in notes 21-23, supra.

28/ As of 1982, the minority ownership figures for Transportation and Public Utilities (which includes, e.g., taxi services), Retail Trade and Services were 7.7% (90% of which had no paid employees), 7.55% (80% of which had no paid employees) and 6.46% (67% of which had no paid employees) See the sources cited in notes 21-23, supra.

capital requirements (together, in some cases, with an advantage for minority-owned firms in attracting customers of the same ethnic group).29/

The case of the supposed "model minorities" is, I suggest, highly instructive. As of 1982, the overwhelming majority of businesses owned by Chinese Americans and Japanese Americans were tiny enterprises engaged in Retail Trade or Services (or, in the case of Japanese Americans, Agricultural Services).30/ It would be absurd to suggest that this pattern is simply due to some special affinity of Chinese Americans, or of Japanese Americans for the ownership of small businesses. Whatever the cultural factors at work, discrimination against these minorities has clearly played an important role in shaping the business opportunities available to them.

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29/ See A Common Destiny, at 180-83, 314-15.

30/ Retail Trade and Services acconted for 74.4% of Chinese-owned firms and 63.6% of Japanese-owned firms. See 1982 Survey of Minority-Owned Business Enterprises (Bureau of the Census, MB82-3), Table 1. An additional 10% of the Japanese-owned firms were enterprises in Agriculture -- mainly Landscape and Horticulture -- with no paid employees. Id. For the country as a whole, Retail Trade and Services accounted for 56.5% of all firms. See Statistical Abstract of the United States 1986, Table 876.

b. The Maturity of the Broadcasting Industry

There is yet another factor that accounts for the low percentage of minority ownership in radio and television. By the 1970s, when the FCC adopted its minority preference policies, the industry was already a mature one, and the frequency spectrum, particularly for AM radio and VHF television stations, already well saturated.31/ New licensing was largely confined to FM radio and UHF television stations, primarily in smaller markets.32/ There was limited opportunity for any prospective broadcaster -- minority or nonminority -- to own a radio or television station by any means other than through the purchase of existing stations.33/

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31/ As of the end of June 1973, licenses for 765 of (66.6%) of the 1,149 commercial television stations that existed in mid-1989 had already been awarded. See 39 FCC Ann. Rep./Fiscal Year 1973, at 194 & 197. As for VHF stations, 521 (91.4%) of the 570 authorized today had been licensed by the middle of 1973. Id. The situation with regard to radio stations was not materially different. Of the 10,209 AM and FM radio stations authorized by the FCC as of the middle of this year, 6,994 (68.5%) had been handed out by the middle of 1973, while some 4,434 (85%) of the AM stations had likewise been awarded at that time. Id.

32/ From 1974 through 1984, the FCC authorized 364 new UHF and 38 new VHF stations (including "low power" TV stations), along with 1,377 new FM and 469 new AM stations. See 41 FCC Ann. Rep./Fiscal year 1975 at 95; 51 FCC Ann. Rep./Fiscal year 1985 at 35.

33/ Displacement of an existing broadcaster in favor of a competing applicant who files at the time of license renewal has always been extraordinarily rare. See, e.g., Central Florida Enterprises, Inc. v. FCC, 598 F.2d 37 (D.C. Cir. 1978), cert. dismissed, 441 U.S. 957 (1979). Occasions when an existing

(continued...)

But that method of entering the industry has, of course, generally been closed off to minorities due to economic barriers.34/

2. The Minority Ownership Policies as Nonremedial Measures: The Contribution to a Diversity of Viewpoint

For the reasons I have outlined, action by the Congress to remedy the effects of society-wide discrimination upon minority ownership in broadcasting and cable is fully warranted. As I have argued, however, that action need not and should not be confined to compensating "victims" or aiding "disadvantaged entities." For the country has a special interest in the diversity of viewpoint

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33/ (...continued)
authorization has been revoked or otherwise terminated and the relevant frequency has been opened to new applications have been somewhat more common, but still very infrequent. From 1944 through 1984, the FCC revoked or otherwise terminated the licenses or permits of 16 television stations and 101 AM or FM radio stations. See 53 FCC Ann. Rep./Fiscal Year 1987 at 35 and 36. By contrast, from 1981 through 1984 alone, 256 television stations and 2800 AM or FM stations changed hands by assignment or transfer. See Antitrafficking of Broadcast Licenses, Hearings before the Subcommittee on Telecommunications and Finance of the House Committee on Energy and Commerce, 100th Cong., 1st Sess. on H.R. 1187, at 104, 163 (1987).

34/ The tax certificate device, the only one applicable to cable television, was not extended to minority purchases of cable systems until December 1982. Minority Ownership of Cable Television Facilities, 52 Rad. Reg. 2d (P&F) 1469 (1982). At that point, there were some 6,000 operating cable systems, 67% of the 9,000 now operating. See Television & Cable Factbook at C-375 (1989). At the time the FCC acted, there were some 15,000 cable franchises outstanding, of which only 45 were held by members of racial minority groups. See 52 Rad. Reg. 2d at 1471.

and perspective in the services provided by those media, and all of us are harmed by the loss of the special contribution to that diversity that minority owners can make.

Radio and television, as I have suggested, play an enormous role in American life. More households have radio and television sets than have telephones.35/ Americans spend major portions of their time with these media, and derive much of their information about the world from their services.36/ It is a matter of high national importance that the programming and editorial decisions governing those services reflect the diversity of the country as a whole.

Our diversity is one of the great strengths of this country. The different racial, ethnic and cultural heritages that are reflected in our population are a source of enrichment for all of us. In that sense we are not a melting pot but a democracy that values these backgrounds as equally valuable and deserving of respect.

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35/ Some 99% of all households have radio sets (Radio Facts 1986-87, Radio Advertising Bureau, p.3); 98% have television sets. 57 Television Cable Factbook (1989) at C-331. Only 93.3% of households have telephones. See Telephone Subscribership in the U.S., FCC Common Carrier Bureau, Industry Analysis Division (Aug. 1989).

36/ See Broadcasting-Cablecasting Yearbook 1988, at A-2.

This is a limited concept. I do not mean to suggest that the FCC should seek to allocate a certain percentage of its licenses to, for example, members of various political parties. The diversity rationale that I advance does not stand alone, but exists in tandem with the rationale of remedying the continuing effects of discrimination. That is why I find the categories of remedial and nonremedial somewhat misleading. My diversity rationale, therefore, does not extend further than those minority groups that were victims of society-wide and pervasive discrimination.

The FCC has long sought to encourage a diversity of viewpoints in radio and television service by diversifying the ownership of broadcast media, at both the local and the national level. "The vitality of our system of broadcasting," it has said, "depends in large part on the introduction into this field of licensees who are prepared and qualified to serve the varied and divergent needs of the public," and the "operation of broadcast stations by a large group of diversified licensees" will "maximize diversification of program and service viewpoints."37/ Its thesis has been that "news communicated to the public is subject to selection, to editing, and that in addition there may be diversity

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37/ Multiple Ownership of AM, FM & Television Broadcast Stations, 18 F.C.C. 288, 291 (1953).

in method, manner and emphasis of presentation."38/ Placing "the power to control what the public hears and sees" in many hands is therefore expected to produce a greater diversity of editorial perspective.39/

Acting on this thesis, the FCC has limited the radio and television stations that any one party may own, and has restricted the cross-ownership of broadcast stations and media such as newspapers and cable in any given area. The Supreme Court has held that these policies "promote free speech" and "further . . . 'the system of freedom of expression.'"40/

The barriers to minority ownership I have discussed frustrate the full achievement of this diversity goal. Given those barriers, race-neutral policies promoting ownership diversity do not of themselves provide anything like a real chance for racial minorities to make the distinctive contribution to viewpoint diversity they could otherwise make. The minority ownership policies, which seek to overcome those barriers, are

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38/ Scripps-Howard Radio, Inc. v. FCC, 189 F.2d 677, 683 (D.C. Cir.), cert. denied, 342 U.S. 830 (1951).

39/ Multiple Ownership of Standard, FM & Television Broadcast Stations, 22 F.C.C.2d 306, 310 (1970).

40/ FCC v. National Citizens Committee for Broadcasting, 436 U.S. 775, 801, 802 (1978).

thus a complementary part of the larger effort to achieve viewpoint diversity.

a. Legal Objections to Diversity Rationale

A variety of objections have been raised to the use of minority ownership preferences for this purpose. It has been suggested that only "remedial" objectives can qualify as a "compelling interest" under the "strict scrutiny" approach.41/ As I have shown, however, the minority ownership policies are "remedial." They seek to remedy the continuing effects of society-wide discrimination in the broadcasting and cable fields. The source of this "remedial only" argument is Justice O'Connor's statement in Croson that race-conscious government actions create a risk of "stigma" unless they are "strictly reserved for remedial settings."42/ This stigma rationale seems wholly inapposite to ownership. Moreover, Justice O'Connor had earlier recognized unequivocally that at least some nonremedial purposes are valid.43/ As Chief Judge Wald pointed out in Shurberg, "a brief, ambiguous reference in a case involving a quite different plan" does not suggest that Justice O'Connor has "now abandoned

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41/ See Shurberg, 876 F.2d at 919-20 (opinion of Judge Silberman).

42/ Croson, 109 S. Ct. at 721.

43/ Wygant, 476 U.S. at 286 (O'Connor, J., concurring).

[nonremedial] rationale[s] entirely."44/

The principal instance in which the Supreme Court has recognized a nonremedial justification is the Bakke case, in which the Court not only struck down an admissions plan for a state medical school that set aside a specified number of positions for minority applicants, but also (as is often overlooked) reversed a lower court injunction requiring the school to follow an entirely color-blind approach. Justice Powell's pivotal opinion held it vital to the educational mission that university students have "wide exposure to the ideas and mores of [other] students as diverse as this Nation of many peoples,"45/ and declared that race could be taken into account as one factor affecting the desired diversity. He expressly analogized this state interest to the First Amendment interest in a diversity of control and viewpoint in mass media.46/

Judicial opponents of the minority ownership policies argue that this recognition of the diversity goal was limited to the higher education setting, as if it could be cordoned off as

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44/ Shurberg, 876 F.2d at 942 (dissenting opinion of Chief Judge Wald).

45/ Bakke, 438 U.S. at 313.

46/ Id. at 314-15.

the only context in which diversity is a valid goal.47/ That argument seems to me to put the issue exactly backwards. If the diversity goal has any legitimacy as a basis for race-conscious action (and I think it plainly does), the pursuit of that goal cannot be confined behind ivy-covered walls. Its most important application lies in the media, to which the country at large -- including millions who may otherwise have little contact with minorities in their daily lives -- has access.

b. Factual Objections to Diversity Rationale

It is further argued that there is inadequate factual basis for the belief that minority ownership leads to the presence of minority viewpoints and perspectives in radio and television service -- that any assumption to this effect is the product of unthinking, constitutionally offensive reliance upon racial stereotypes.48/ The discussion of this point has often been confused by an assumption that the goal of the minority ownership policies is to produce programs addressed to the tastes and interests of racial minorities.49/ That, I suggest, is plainly

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47/ See, e.g., Shurberg, 876 F.2d at 919-20 n.27 (opinion of Judge Silberman).

48/ See id. at 922-23 (opinion of Judge Silberman); Winter Park, 873 F.2d at 361 (Williams, J., concurring in part and dissenting in part).

49/ See, e.g., Shurberg, 876 F.2d at 922-23 (opinion of (continued...)

wrong. The diversity sought by those policies is for the benefit of the country as a whole -- not just minorities.50/ It may be reflected in programs that appeal to minority tastes, but it is also important in programs that appeal to everyone. And there is substantial factual basis for the belief that such diversity can be better achieved if there are greater opportunities for minorities to acquire positions of power and leadership in the broadcast and cable media.

Consider, for example, the case in which a minority owner participates actively, on a daily basis, in the editorial decisions of his or her station or cable system. There is nothing unthinking or stereotypical in the view that membership in a minority group gives one a set of distinctive viewpoints and perspectives.51/ Those viewpoints and perspectives must

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49/ (...continued)
Judge Silberman); Winter Park, 873 F.2d at 358-61 (Williams, J., concurring in part and dissenting in part).

50/ See West Michigan, 735 F.2d at 610, 614; Shurberg, 876 F.2d at 942-44 Shurberg, (opinion of Chief Judge Wald).

51/ See Bakke, 438 U.S. at 314 (opinion of Powell, J.) ("medical student[s] with a particular background -- whether it be ethnic, geographic, culturally advantaged or disadvantaged -- [have their own distinct] experiences, outlooks, and ideas"); see also A Common Destiny, at 200; H. Schuman, C. Steeh & L. Bobo, Racial Attitudes in America: Trends and Interpretations 143, 162 (1985). Even opponents of racial preferences concede this point. See After Lucas, Wall St. Journal, Aug. 14, 1989, at A8 col. 1 (arguing that President Bush's nominee to head Civil Rights Division would have brought unique minority perspectives to job). Indeed, some insist upon the importance of the differing cultures (continued...)

necessarily affect the editorial decisions of such a minority owner. Like any other owner, he will no doubt respond to the imperatives of running a business and meeting a payroll.52/ But there is more than one way to respond to marketplace imperatives. If marketplace forces make the personal qualities of owners irrelevant to the conduct of the media they own, it is hard to understand why the FCC, in an era of unprecedented deregulation and reliance upon the marketplace, continues to concern itself with the "character" of its broadcast licensees.53/

Where the minority owner does not participate actively in daily decisions, the link between his minority status and the service to the public is less direct. But his power to affect those decisions is nonetheless real. Minority owners, for example, are more likely to entrust day-to-day decisionmaking to other minorities. As of September 1986, there were 14 black or Hispanic General Managers of television stations in the United States. Half of those 14 were at stations owned or controlled by

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51/ (...continued)
of ethnic groups. See T. Sowell, The Economics and Politics of Race 244 (1983); T. Sowell, Ethnic America 280-86 (1981).

52/ Cf. Shurberg, 876 F.2d at 923 (opinion of Judge Silberman) ("it is not at all apparent why a station owner, be she minority or nonminority, would make programming decisions according to her personal tastes rather than in response to the demands of the marketplace.").

53/ See Policy Regarding Character Qualifications in Broadcast Licensing, 102 F.C.C. 2d 1179, recon. denied, 1 FCC Rcd. 421 (1986).

minorities.54/ Similarly, as of 1980, there were some 64 radio stations that engaged primarily in Spanish-language broadcasting. Only a fourth of those stations were owned by Hispanics, but over 80% of the Hispanic-owned stations employed a majority of Hispanics in management positions; only a third of the stations owned by Anglos filled a majority of their management positions with Hispanics.55/

Even where minority ownership does not involve the placing of an owner or other minority person in direct editorial control, it necessarily affects the outlook and conduct of those who occupy that position. I urge you to consider, in this regard, the long-standing research studies showing that contact with minority persons of equal or higher status and authority has the effect of dispelling prejudicial preconceptions among nonminority persons.56/ There is every reason to believe that lessened prejudice is accompanied by an increased sensitivity to minority perspectives and viewpoints. Moreover, the objective of dispelling racial prejudice is itself a thoroughly compelling

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54/ National Association of Broadcasters, Minority Broadcasting Facts 9-10, 55-57 (1986).

55/ See Schement and Singleton, The Onus of Minority Ownership: FCC Policy and Spanish-Language Radio, J. Comm. at 78, 80-81 (Spring 1981).

56/ See, e.g., Amir, "The Role of Intergroup Contact in Change of Prejudice and Ethnic Relations," in Towards the Elimination of Racism 264-67 (1976).

goal, which is closely related to the goal of achieving viewpoint diversity.

Opponents of the minority ownership policies argue that the radio or television audience does not know the identity of the owner and hence that minority ownership cannot have such a prejudice-dispelling effect.57/ I rather doubt the premise; I think that many people know who owns the stations or cable systems that serve them. But the question is immaterial. If the audience does not know, the manager, the program director, the sales manager and the news director surely do. So do the major advertisers, program suppliers, networks and others who deal with the station or system, as well as its competitors and colleagues in the market and the industry as a whole. All of these individuals and institutions are forced to deal with minority persons on terms of equal or (in the case of employees) inferior status and authority. It is entirely reasonable to expect increased respect for and understanding of minority viewpoints and perspectives.

There have for many years been complaints that the radio and television media not only fail to convey minority viewpoints and perspectives, but portray the world primarily from a majority

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57/ See Winter Park, 873 F.2d at 357-58 (Williams, J. concurring in part and dissenting in part).

perspective and, in so doing, convey to their audiences a stereotypical view of minorities and an inaccurate view of race relations.58/ I am not here to argue the rights and wrongs of those complaints, or to suggest that government at any level can constitutionally seek to dictate the elimination of racial stereotypes or the accurate portrayal of race relations in media programs.59/ For the reasons I have suggested, however, minority ownership of radio and television media can work to break down prejudicial preconceptions about minorities and increase sensitivity to minority perspectives among those who exercise editorial power in those media.

There is, to be sure, no easy way to measure any of these effects upon the diversity of radio and television service

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58/ See, e.g., U.S. Civil Rights Commission, Window Dressing on the Set: Women and Minorities in Television at 48 (1977) [hereinafter "Window Dressing on the Set"]; U.S. Civil Rights Commission, Window Dressing on the Set: an Update (1979); National Commission on Working Women of Wider Opportunities for Women, Unequal Picture: Black, Hispanic, Asian and Native American Characters on Television (1989). See also the studies cited in Wimmer, The Future of Minority Advocacy before the FCC, 41 Fed. Comm. L.J. 133, 140-41 nn.24-29 (1989). While such complaints have focused largely on prime time television entertainment, they have been raised as well in connection with news programming. See, e.g., Storer Broadcasting Co., 60 F.C.C.2d 1097, 1103 (1976).

59/ The FCC has (quite properly, in my view) refused to engage in any such attempt. See Window Dressing on the Set, supra note 58, at 172 (FCC Comments); Minority Ownership of Broadcasting Facilities, 68 F.C.C.2d 979, 981 (1978). See also Storer Broadcasting Co., 60 F.C.C.2d at 1103.

viewpoints. As the Supreme Court has noted, "'diversity and its effects are . . . elusive concepts, not easily defined let alone measured without making qualitative judgments objectionable on both policy and First Amendment grounds.'"60/ But the difficulty of measurement does not make the effect any less real or the factual basis for believing it will occur any less sound. Many important decisions must rest, in the end, upon human judgment, informed by the totality of the facts available.

I think, in short, that the minority ownership policies clearly meet the "compelling interest" requirement, as measures designed to redress the continuing effects of society-wide discrimination and to promote viewpoint diversity in the broadcast and cable media. A finding to this effect by Congress, for which there is ample factual basis, would not conclusively resolve the issue in the courts, which must make the ultimate constitutional decision. But such a finding would be entitled to substantial judicial deference.

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60/ FCC v. NCCB, 436 U.S. at 796-97.

C. Narrowly Tailored Analysis

Of course, it is not enough for Congress merely to have established these two related interests -- remedying the effects of past (and present) discrimination and promoting diversity by seeking a greater expression of minority viewpoints and perspectives. In addition, the means chosen to achieve these ends must be "narrowly tailored."

Before addressing whether or not the minority preferences are narrowly tailored, let me make a preliminary comment. Every minority owned company that seeks to acquire a broadcast license must satisfy the various qualifications, including financial qualifications, that the FCC requires of all of its licensees.61/ There are no goals or quotas that are associated with the FCC minority preference policies. If there is no minority that can meet the FCC's requirements, the policies have no effect. Said another way, the minority preference policies depend entirely on there being otherwise qualified minorities available; they do nothing to increase those numbers.

I would like to address the three most significant aspects of the narrowly tailored criteria that I think apply to

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61/ Minorities that seek cable television franchises must likewise meet the requirements of franchising authorities.

these policies and which must be satisfied: (1) who should be the beneficiaries of these policies, (2) the consideration of race-neutral means to achieve these same ends, (3) the burden these policies place on nonminorities.

1. The Beneficiaries

There are two concerns here: (a) can all members of those minority groups that have been victims of society-wide discrimination that has caused their underrepresentation in radio and television ownership benefit from these policies or must well-off minorities be disqualified from being beneficiaries, and (b) should these preferences operate generally throughout the United States or should they be limited geographically to only those areas where there is a local history of discrimination. These concerns were expressed to some extent in Croson, Shurberg, and in the dissent in Winter Park where the issue was whether the preferences should be waived if the beneficiaries were allegedly not themselves "victims" of discrimination. Here, however, those concerns stem, in large part, on a fundamental misunderstanding as to what is being remedied by the FCC minority preference policies.

While is undoubtedly the case that racial discrimination affected poor minorities more obviously than more

well-off minorities, it is undeniable that virtually all minorities were affected. Discrimination on the basis of race is not equivalent to discrimination on the basis of economic class, though there is clearly overlap. And, sadly, racial discrimination continues today and pervades many of our attitudes and expectations, and to some extent our actions. Whether they are so-called "fat cats" or are less well-off minorities, the FCC minority preference policies seek to overcome the barriers that all minorities confront due to discrimination and to include their voices among those that have access to radio and television.

It is important to realize that what is being sought here are viable owners of radio stations, television stations, or cable franchises. These entities must have financial resources to enable them to be in a position to purchase a radio or television station, and if they are successful in acquiring a radio or television station, they must have financial stability in order to have an impact on the industry at large.

With respect to the question of geographic scope, the minority preference policies address discrimination that is nation-wide. In a very real sense we, as a nation, have national attitudes toward race. Most of these are not conscious attitudes. It matters little that someone comes from Montana or Texas or Alaska or Washington D.C. We have much common history.

Significantly, the beneficiaries of these policies are not just the minorities that become licensees, but also the audiences that will be able to hear a new and different viewpoint and perspective. Radio and television stations do not exist as isolated stations scattered across the country. There is a nationwide industry. Getting into the business is getting into the business, wherever that is.

2. Race-Neutral Alternatives

The Supreme Court requires that before a racial preference can be employed there must have been "consideration of the use of race-neutral means to increase minority business participation." Croson, 109 S. Ct. at 728. Here, there has been more than mere consideration of race-neutral alternatives; there is a long history of the actual operation of race-neutral alternatives designed specifically to achieve diversity among the owners of radio and television licenses. The FCC's "multiple-ownership" rules limit multiple owners and are designed "to achieve the public interest goal of promoting diversity of viewpoints."62/ Those rules were instituted well before the minority ownership policies were adopted, and the record is clear that they resulted in no appreciable increase in the number of

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62/ See Amendment of Section 73.3555, 4 FCC Rcd. 1741, 1743 (1989).

minority owners of radio or television licenses. Congress can certainly rely on this experience in concluding that resort to a racial means was necessary. This is especially so when the results under that preference are taken into account, for in the decade since the adoption of these policies the number of minority licensees has virtually doubled.63/

3. Burden on Nonminorities

The degree of the burden that a racial preference places on nonminorities is also relevant to determining whether the preference is narrowly tailored. It is clear, however, that the use a race-based measure necessarily requires some nonminorities to bear some degree of burden.64/ Neither the comparative preference nor the tax certificate raise any serious concerns on this count. In neither preference are nonminorities excluded from competing for licensees. In the case of the comparative hearing enhancement, race is only one "plus factor" in the FCC's decision-making process. See Winter Park, 873 F.2d at 354.65/ Similarly, in the tax certificate situation, there is no

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63/ Needless to say, the race-neutral alternative of reviewing the program content of all broadcasters to determine their sensitivity to minority views would raise serious First Amendment problems.

64/ Wygant, 476 U.S. at 281.

65/ Even Judge Silberman recognized that "since race is (continued...)

foreclosure of nonminorities from competing for licenses. In fact, the overwhelming majority of stations sold after the implementation of this policy were sold without benefit of tax certificates and were sold to nonminorities.66/ The availability of a tax certificate is primarily of benefit to the minority purchaser, and in any event is only one factor taken into account by the nonminority seller.

The distress sale policy cannot be so easily squared with this factor. It is undeniable that it operates to foreclose all nonminorities from the market for stations that are under threat of losing their licenses in a designated hearing that does not include a competing applicant. True, the absolute number of such stations -- thirty-eight since the implementation of the policy -- is so small as to argue strongly that the impact that this policy has on nonminorities is of no constitutional

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65/ (...continued)
only one consideration among many in the comparative license practice challenged in Winter Park, it is distinguishable from the distress sale policy . . . . " Shurberg, 876 F.2d at 907-08 (opinion of Judge Silberman). But see Winter Park, 873 F.2d at 368 (Williams, J. concurring in part and dissenting in part) ("I am unpersuaded that the multi-factored approach in this case -- if that is what it really is -- saves the minority preference scheme.").

66/ Since 1978 tax certificates have been granted for sale of 18 television stations and 168 radio stations. "Minority Ownership List," FCC Consumer Assistance and Small Business Division, Office of Public Affairs, August 1989. From just 1981-86, 555 television stations were sold, and from just 1981-85 some 3842 radio stations were sold. See Antitrafficking of Broadcast Licenses, at 104, 163.

significance. This would especially appear to be the case since nonminorities are "free to compete for the vast majority of licensee opportunities available." Shurberg, 876 F.2d at 951 (dissenting opinion of Chief Judge Wald). This argument was rejected by the majority in Shurberg, however, and whatever I may believe to be the better argument, that is not presently the law in the D.C. Circuit.

Furthermore, Congress may not have the same power with regard to a judicial decision that a race-based measure places an unconstitutional burden on nonminorities as it does with regard to a judicial decision that it had not adequately established the interests on which it was predicating the minority policies. In the latter case Congress can, as I suggest it should, better establish the remedial and diversity interests that are served by these policies. With regard to the impact of the distress sale policy on nonminorities, however, it is unclear whether Congress can override the judgment of the D.C. Circuit. That is not to say that there are not ways in which the distress sale policy could be revised to avoid this problem. I have not undertaken to suggest ways in which that could be accomplished in my testimony.67/

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67/ There are other aspects of the narrowly tailored analysis that I have not discussed. For example, the minority ownership policies should not be completely open-ended. That is, there should a clear time limit on the program or, alternatively, periodic review of the effectiveness and continued need for the programs. Congressional oversight hearings should suffice. While (continued...)

## CONCLUSION

In addressing matters of racial discrimination there is no branch of government that has greater powers than the Congress. Cities and states may be restricted to seeking to remedy the effects of discrimination in their jurisdictions; Congress can look at our entire society. A federal court may have limited remedial powers; Congress has broad legislative powers. The Congress has broad fact finding powers, vast remedial powers, and given its unique role, a special obligation to see that discrimination and its effects are rooted out. Our democracy is dependent on communications and the competition of ideas and viewpoints. In a fundamental way, the lack of minority ownership in broadcasting undermines the diversity that is our strength. Ensuring that this diversity is fostered is at least as important a governmental interest as rooting out the continuing effects of discrimination.

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67/ (...continued)
Congress has set no goals or numerical targets, it should have some base line from which it can judge the success of the program. At this point, where the numbers of minority owners are so small, and given the modest approach taken by these policies, this does not require much analysis. But these are only minor points that are raised by these policies, and therefore I have chosen to address in some detail only the major ones.

Senator INOUYE. Thank you very much, Mr. Payton.
Mr. Kennard.

STATEMENT OF WILLIAM E. KENNARD, ATTORNEY

Mr. KENNARD. Thank you, Mr. Chairman. My name is William Kennard. I am with the law firm of Verner, Liipfert, Bernhard, McPherson and Hand.

Mr. Chairman, Senator Burns, personally I recall very vividly in the late 1960s and the early 1970s when a black face appeared on a television screen in my household, it was really an event as I know it was truly an event in minority households across the country. The fact is that those first realistic portrayals of minorities on television was important to the minority community in this country as it was important to all Americans.

Fortunately, the faces of blacks and other minorities on television screens are not as rare today as they once were. But minority ownership of broadcast stations is still very rare.

I think it is important to put the numbers in perspective. There are 12,000 radio and television stations in the country. Two percent of those stations are minority-owned. That is only 240 stations nationwide.

We must remember that just as the FCC in the late 1960s with the adoption of EEO rules fostered a regulatory climate that contributed to the first meaningful appearances of minorities on television, adoption of the minority ownership policies that you are considering today—the tax certificate, the distress sale and preference in comparative hearings—which were adopted in the mid-seventies and late seventies, have resulted in really the first modest gains for minority entrepreneurs in this country to get into the mass media business.

Since 1978 when the Commission first adopted the tax certificate and distress sale policies, there have been 186 tax certificates issued and 38 distress sales. A majority of all stations that have been acquired by minorities in the country have been acquired through the benefit of these policies.

As an attorney, I have had the opportunity to become involved in a number of tax certificate transactions. The tax certificate is a very successful means of creating incentives for minorities to get in the business. It has worked to break down an "old boy" network that had excluded minorities from information about stations available. I think a good recent example of that is the announcement that the New York Times Company would sell its cable television system to a minority company. It was widely known in the industry that the New York Times wanted to sell to a minority company. They narrowed down the bidding to five reputable companies and recently have announced the sale of the cable system to a company headed by Bruce Llewellyn. That is a very significant transaction.

Preferences for minorities in comparative hearings have also brought minorities into the licensing process to take advantage of entry level licensing opportunities that otherwise would be denied them. And I would like to emphasize here that the benefits of these policies are realized at every level of the business. If you look at

the FCC's records to see who is benefiting from these tax certificates, you will find that most of the tax certificate sales have involved first-time buyers of small to medium-sized radio properties.

In the last few years we have seen the tax certificates involved in some very major transactions. That is very significant, too, because it has involved minority entrepreneurs in a very different playing field, the "Fortune 500" level, if you will, where minorities have never been represented meaningfully. But I think it is important to stress that the overwhelming majority of these deals are not confined to a few wealthy individuals and companies. They are, by and large, small market radio stations.

I will not review for you the findings of last year's study by the Congressional Research Service on the nexus between minority ownership and diversity because we have heard about that a number of times this morning. But I would like to emphasize that the minority ownership policies that you are considering are not set-asides and they are not quotas. There are very modest incentives that have widespread support in the industry and have proven to produce real successes. We have heard a lot in recent years about a marketplace approach to regulation. Well, here you have a marketplace incentive to increase minority ownership that truly works.

I am sure what I have said today comes as no surprise to you, Mr. Chairman, and Senator Burns, because on three occasions Congress has recognized in legislation that the minority ownership policies further two important goals: one, to remedy underrepresentation of minorities in the business and, second, to promote diversity of expression over the airwaves.

In light of the Court of Appeal's decision in the recent *Shurberg* case, it is vitally important that Congress reaffirm its commitment to these policies by codifying them in the Communications Act. Thank you.

[The statement follows:]

**TESTIMONY OF**

**WILLIAM E. KENNARD, ESQ.,**
**VERNER, LIIPFERT, BERNHARD, McPHERSON AND HAND, CHTD.**

Good morning Mr. Chairman and Members of the Subcommittee. My name is William E. Kennard. I am an attorney with the law firm of Verner, Liipfert, Bernhard, McPherson and Hand, Chartered, in Washington, D.C. The views that I express today are my own, and do not necessarily reflect the views of my law firm or any of its clients.

W.E.B. Dubois once wrote of black America's perception of itself in the media. He observed that "it is a strange sensation, this feeling of being forced to view one's self through the eyes of others." I recall the sense of elation in my household in the late 1960's and early 1970's when a black face would appear, however momentary, in a television commercial or series. Those first realistic portrayals of blacks on television were truly a cause for celebration. By adopting equal employment opportunity rules in 1969, the Federal Communications Commission created a regulatory climate that helped to make those gains possible.

The FCC's minority ownership policies, which are the subject of today's hearing, were adopted in 1978 as a logical extension of the FCC's efforts begun in the late 1960's to promote more meaningful representation of minorities in the media. The central question posed by the Court of Appeals in the recent Shurberg and Winter Park cases is whether the Commission's minority ownership policies do in fact contribute to that goal. Do policies that provide preferences for minorities to acquire broadcasting and cable properties promote diversity of expression by providing outlets for minority views long-excluded from the

airwaves? Do these policies serve to remedy past discrimination against minorities in the licensing and sale of mass media outlets? Or are these policies simply a means of enriching a few wealthy individuals -- minority and nonminority alike -- with no palpable benefit to the public interest?

Anyone who has objectively studied the progress of minorities in broadcasting cannot help but conclude that the Commission's minority ownership policies have achieved significant successes. Broadcasting is a mature industry. Today's major broadcasting companies were established decades ago, when de facto and de jure discrimination excluded black Americans from even the most basic public accommodations. The minority ownership policies are a minimally intrusive means of remedying this injustice. The modest gains that minorities have made in the ownership of broadcast stations since the late 1970's are a direct progeny of government actions to foster that goal.

In 1978, when the FCC announced its tax certificate and distress sale policies to assist minority companies seeking to purchase existing broadcast stations, fewer than 1% of broadcast stations were owned by minority companies. Since that time, minority companies have acquired 186 broadcast stations through the benefit of tax certificates and 38 stations through the benefit of distress sales. These two policies account for a majority of the approximately 240 broadcast stations owned today by minorities. Minorities own about 2% of the approximately

12,000 broadcast stations nationwide. While minorities remain underrepresented in broadcast ownership, the situation would be far worse absent the favorable climate for minority ownership created by the FCC's minority ownership policies. By creating incentives for sellers of broadcast stations and cable television systems to seek out minority buyers, the Commission's minority ownership policies work to break down the "old boy" network which has excluded minorities from the marketplace.

The benefits of the Commission's minority ownership policies are realized at every level of the industry. The overwhelming majority of tax certificates and distress sales approved by the FCC have involved the purchase of stand-alone radio stations by first-time buyers in small to medium-sized markets. More recently, the FCC's tax certificate policy has assisted minority companies in acquiring some of the largest and most influential broadcast and cable properties. In January, 1989, for example, the New York Times announced plans to sell its cable television operations for $420 million to a minority-controlled company headed by black businessman J. Bruce Llewellyn. Also this year, Jack Kent Cooke announced plans to sell his Arizona, Georgia and Tennessee cable properties for an estimated $400 million to a company controlled by another black businessman, Frank Washington. Thus, the tax certificate policy has promoted minority entry at the very highest levels of the industry where minorities have never been represented.

Minority-owned stations have spawned two nationwide black radio networks, and have helped to break down barriers in the advertising community, which has traditionally undervalued black consumers.

There is empirical evidence that minority ownership does translate into increased levels of programming for minority audiences. In 1988, the Congressional Research Service examined data collected by the FCC from nearly 9,000 television and radio stations. Station owners were asked what percentage of ownership interest in their stations was held by minorities and whether the stations provided specialized programming directed to minority audiences. The study found a strong correlation between minority ownership and programming targeted to minority audiences. Thus, whereas only 20% of stations without any black ownership responded that they provide progamming directed to black audiences, 65% of stations with black ownership said that they did so. Only 10% of stations without Hispanic ownership provided Hispanic programming, while 59% of stations with Hispanic owners provided Hispanic programming.[1]

These findings come as no surprise to Members of Congress, and particularly the distinguished Members of this subcommittee. On three separate occasions, Congress has recognized in

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[1] Congressional Research Service Report, "Minority Broadcast Station Ownership and Broadcast Programming: Is There A Nexus?" (1988).

legislation that the Commission's minority ownership policies are essential to remedying inequities in society and in promoting diversity of expression on the airwaves.[2] With the prospect that the Shurberg and Winter Park cases may be heard by the Supreme Court, a clear record of Congressional support for these policies is crucial.

Congress should also remain vigilant to ensure that the FCC maintains the integrity of its minority ownership policies. While the vast majority of companies seeking to qualify under the Commission's minority ownership program are bona fide, there have a few isolated instances of abuse. Congress should ensure that the FCC carefully scrutinizes all applicants, weeding out sham companies which purport to be minority controlled when, in fact, de facto control resides in nonminority investors. In this regard, companies are inherently suspect when the minority principals invest insignificant amounts of capital and enter into short-term options to sell their controlling interests to nonminority investors. In sum, Congress must ensure that the FCC invests the resources to carefully administer its minority

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[2] See H.R. Conf. Rep. No. 765, 97th Cong., 2d Sess. 40 (1982) (directing the FCC to administer minority preferences for applicants competing in lotteries for new broadcast station licenses); Pub. L. No. 100-202, 101 Stat. 1329-31 (1987) (directing the FCC to terminate its inquiry into the constitutionality of its minority ownership policies because "the inquiry is unwarranted . . . [d]iversity of ownership results in diversity of programming."); Pub. L. No. 100-459, 102 Stat. 2186, 2216-17 (1988) (renewing directive that FCC terminate reexamination of the FCC's minority ownership policies).

ownership program.

In adopting its minority ownership policies, the FCC cited the 1968 findings of the Kerner Commission that America is a nation divided by race. The Kerner Commission had concluded that media's indifference to the realities of black life in this country contributed to the devastating civil unrest of that period. "This may seem understandable," the Kerner Commission wrote, "but it is not excusable in an institution that has the mission to inform and educate the whole of our society." [3]

As we revisit the minority ownership policies today, we cannot look back at the Kerner Commission's grim findings as a closed chapter in our history. Race relations in our cities remain dangerously polarized, as the violent explosions of racial tension in Virginia Beach and Brooklyn just this summer attest. An update of the Kerner Commission findings released last year concluded that despite fleeting gains made in the 1970's, the United States is more polarized by race today than in 1968.[4] The need for all of our social institutions to try to close the widening gap between races is as pressing today as in the late 1970's when the FCC adopted its minority ownership policies. The FCC's minority ownership policies have proven to be an important means of furthering that goal.

Thank you Mr. Chairman and members of the subcommittee for convening this hearing and affording me the opportunity to express my views.

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[3] Report of the National Advisory Commission on Civil Disorders 203 (1968).

[4] Harris & Wilkens, 1988 Commission on the Cities: The Kerner Report Twenty Years Later 6-9 (1988).

Senator INOUYE. Thank you very much.
Dr. Fife.

**STATEMENT OF MARILYN FIFE, PH.D., ASSISTANT PROFESSOR, DEPARTMENT OF RADIO, TV AND FILM, TEMPLE UNIVERSITY, PHILADELPHIA, PA**

Dr. FIFE. Thank you. My name is Marilyn Fife, and I am an assistant professor at Temple University. I am glad to be here today to bring to bear on this discussion some of the social and scientific data dealing with the issue of the impact of minority ownership.

In particular this morning I would like to talk about the findings of a study I conducted in 1984-85 and also some of the related literature.

The purpose of my study was to explore two questions: One, to what extent does news program content of a minority-owned T.V. station reflect minority ownership and management philosophies of responsive service to minority communities; and, two, to what extent does news program content of a minority-owned T.V. station differ from that of a majority-owned T.V. station, especially in regard to representation of and service to minority communities.

Now, this was a four-city study, and the details of the material I am citing related to the study can be found in my written testimony.

The findings indicate that minority ownership and its management are capable of particular, highly specific, philosophies of service to and about minority communities. When these statements of philosophy are compared to actual over-the-air news content, two facts are established. One is that such philosophies do have a relationship to the representation of minority images and issues in local news, and the other is that such philosophies are influenced by the demographic characteristics of the community being served.

All the minority owners and the management representatives expressed two goals related to the impact of their ownership beyond programming.

One was to create a broadcast institution that could function as a resource for the minority community at the local level and, two, to develop an economic and political base from which to influence U.S. broadcasting and to add to the pool of minority-controlled capital in the U.S.

The two minority-owned stations in the study that were engaged in "narrowcasting"—that is, having minority viewers as their target audience—expressed the common goal of using a major form of electronic media to validate and to showcase a minority culture.

In terms of program content, actual over-the-air content, the data indicate that the three minority-owned stations operating in communities with substantial minority populations have more minority representation and more variety in that representation in their local news than do the majority-owned stations operating in the same market.

The findings of this study were consistent with the findings of earlier studies examining the nexus of minority ownership, station management and programming. These findings include the following: That minority-owned stations are no more nor less competent

than majority-owned stations; that black-owned radio displays more diversity in its over-the-air product than white-owned radio, even when both have black listeners as their target audience; and that Hispanic radio owners employ more Hispanics in management positions than do Anglo-owned stations targeting the same audience.

Additionally, studies have been done that show that the FCC may be placing an unfair burden on minority ownership by expecting it's program content to provide higher levels of merit programming than majority ownership competing in the same market.

Studies such as mine and the ones I mentioned serve as a solid empirical base to begin to document the nexus between minority ownership and programming content.

However, of equal importance are the implications coming from other factors that surface when one examines the ownership programming nexus.

In my extensive interviews with owners and managers of minority-owned T.V. stations, the following factors surface that fell outside of my research design, but present variables that are extremely important in terms of understanding the overall and the larger impact of minority ownership on diversity in broadcasting.

Now, I have listed these situations as research questions because they have yet to be tested, but I think you will see they have very important implications for FCC policy.

One, does minority ownership of media have a positive impact on the overall economic status and influence of minorities in a given community?

Two, does minority ownership influence employment of minorities at all stations in the community by serving both as a training ground for minority youth and as a source of competition that increases the value of minority employees?

Three, does minority ownership increase pressure on nonminority-owned outlets to diversify their own coverage of, and employment from, minority communities?

Four, does minority ownership play a role in influencing ancillary media organizations, such as networks and news services, in terms of their policies related to racial and ethnic pluralism?

These factors have yet to receive the examination that they need to truly understand the nexus between minority ownership and diversity. They appear to have direct bearing on the FCC's pronouncement in its 1978 statement of policy on minority ownership of broadcast facilities in which the commission said, "Diversification of control is a public good in a free society."

The nature of that public good includes more than simple program diversity. What the data indicate is that minority ownership promotes programming diversity, but it also seems to promote other features that add to diversity as a public good.

Thank you.

Senator INOUYE. Thank you very much, Dr. Fife. And may I now call on Mr. Smith.

**STATEMENT OF J. CLAY SMITH, JR., PROFESSOR OF LAW, HOWARD UNIVERSITY LAW SCHOOL, WASHINGTON, DC, ON BEHALF OF NATIONAL BAR ASSOCIATION; ACCOMPANIED BY ERROLL BROWN; CYNTHIA MABRY; AND LISA WILSON**

Mr. SMITH. Thank you, Mr. Chairman—Chairman Inouye, Senator Burns. I respectfully submit our written testimony and my oral testimony contained herein as a writing to be included in the record of this hearing.

My name is J. Clay Smith, Jr. I am a professor of law at Howard University School of Law, and I am here on behalf of the National Bar Association, as is Erroll Brown, Cynthia Mabry and Lisa Wilson, and I am speaking for the group as the rules require.

It is a pleasure to be here today before the Senate Committee on Communications to discuss the state of minority ownership of broadcast facilities as relates to recent actions by the FCC and the court.

I am one of the few people in the room that was a senior staff member at the FCC when the initial minority ownership policy was formulated. I would like to add with some regret that in 1973 I was the first senior black super grade ever hired at the FCC in its history.

A public discussion of this topic is quite timely in light of recent decisions by the D.C. Circuit of the United States Court of Appeals dealing with the validity of the FCC's minority enhancement policy and its distress sale policy.

Because of the D.C. Circuit's decision to invalidate the distress sale policy on equal protection grounds, these comments will focus specifically on this policy alone. Hopefully what is said here today will provide FCC with a legal perspective to defend the distress sale policy should this matter reach the United States Supreme Court, or is used to bring into question FCC's tax certificate policy.

It is generally settled that an agency's decision not to prosecute or to exercise its administrative enforcement authority is a matter of agency discretion. The Supreme Court itself has recognized the general unsuitability for judicial review of agency decisions to refuse enforcement, in the Heckler versus Chaney opinion.

For example, the commission is vested with the power to grant a broadcast license without a hearing if it is able to make the finding that to do so results in the more efficient use of the broadcast spectrum.

Absent specific guidelines to determine a precise definition of the efficient use of the broadcast spectrum, the commission is left to its own devices on how to pursue its public interest mandate.

In May 1978, just a few months after I left the Commission, the Commission issued a policy statement on the minority ownership on broadcast facilities, drawing upon the original minority ownership policy of 1978.

In issuing the new policy statement, the commission exercised its administrative enforcement discretion by introducing the measure whereby nonminority licensees—and by nonminority licensees obviously we know what the definition of nonminority is—who were either facing a revocation hearing or who have had issues designated against their renewal applications significant enough to warrant

a hearing could opt to sell their stations rather than to run the risk of engaging in a hearing where they could be stripped of their license altogether.

That policy was referred to as a distress sale policy. The distress sale policy as adopted in 1978 was not unique because since—at least since 1966 the commission had authorized the assignment of licenses in some instances where there were outstanding issues involving the qualifications of the licensee.

Assignments such as these were and are now permitted in circumstances where the licensee is either bankrupt or physically or mentally disabled. In other words, prior to the distress sale policy the FCC entertained a petition for special relief permitting a licensee in violation of its rules to sell its stations without invoking the FCC's revocation procedures. In sum, the exceptional circumstances, that the Commission has exercised its enforcement powers to avoid revocation hearings by petitions for special relief or by its distress sale policy.

Now, the distress sale policy of the FCC has recently come under scrutiny based on constitutional concerns that this policy discriminates against nonminorities.

We think that such claims of discrimination are inconclusive.

We further believe that the focus on the distress sale cases should, indeed must, focus on the benefit, if any, to the nonminority licensee prior to and after the implementation of the distress sale policy.

The distress sale policy grew out of a dual, not a singular, but a dual recognition by the FCC that it could affect greater diversity in the marketplace through a distress sale policy tied to its enforcement authority. This mixed objective was thought to be well within the public interest mandate prescribed by the Congress in 1934, the year that Congress enacted the Communications Act.

Under the distress sale policy, the public interest was intended to be served by aiding minority entry into the marketplace, and to ease the burden of the exit of nonminorities FCC rule offenders by sparing them from the death penalty, that is, the revocation of their license.

Hence, from its inception, one of the dual objectives of the distress sale policy was to provide direct relief to nonminorities.

Now, how did this policy directly aid nonminorities? The policy allowed the nonminority to exit his or her existing broadcast business without costly hearings and permitted the nonminority licensee to salvage 75 percent or less of the fair market value in the sale of their broadcast property.

This was a significant economically beneficial policy for nonminorities because it permitted them to avoid administrative costs by bypassing a revocation hearing and by being able to reap a profit of up to 75 percent or less of fair market value.

In fact, nonminorities affirmatively sought and gained a clarification from the FCC to make the application of the distress sale policy retroactive. A copy of the clarification of distress sale policy, FCC number 78–725, attached to this oral statement is submitted to the record as evidence on nondiscrimination.

I guess, in sum, to sum up quickly, the key of my remarks here is to demonstrate that the claims made in the Shurberg case that are

being argued that the distress sale policy discriminates against the nonminorities has substantially been mischaracterized.

The distress sale policy created a dual policy that favors nonminorities and minorities, and is constitutionally permissible.

Thank you very much.

[The statement follows:]

[CORRECTED COPY]

**HEARINGS BEFORE THE SENATE COMMERCE COMMITTEE**
**SUBCOMMITTEE ON COMMUNICATIONS**
**HELD SEPTEMBER 15, 1989**

**THE EVOLUTION OF DISTRESS SALES:**
**A Direct Benefit to Non-Minorities**

**by J. Clay Smith, Jr. Esq.**
**Erroll D. Brown, Esq.**
**Cynthia Mabry, Esq. and**
**Lisa C. Wilson, Esq.**

**ON BEHALF OF NATIONAL BAR ASSOCIATION**[1/]

## I. INTRODUCTION

It is a pleasure to be here today before the Senate Subcommittee on Communications to discuss the state of minority ownership of broadcast facilities. A public discussion of this topic is quite timely in light of the recent decisions by the D.C. Circuit dealing directly with the validity of the FCC's minority enhancement policy and the FCC's distress sale policy.[2/]

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1/ National Bar Association was founded in 1925, and is an organization comprised of Black lawyers across the United States. The National Bar Association has, for the last forty years, actively participated in the formation of the nation's telecommunications policy. J. Clay Smith, Jr., Esq. is currently a Professor of Law at Howard University School of Law in Washington, D.C. Erroll D. Brown, Esq. is currently an associate at O'Malley, Miles and Harrell in Landover, Maryland. Cynthia Mabry, Esq. is currently an associate at Crowell and Moring in Washington, D.C. Lisa C. Wilson, Esq. is currently an associate at Fisher, Wayland, Cooper and Leader in Washington, D.C. All views expressed are those of the authors and of the National Bar Association, and do not express the views of the authors' respective employers.

2/ See Winter Park Communications, Inc. v. FCC, No. 88-1755 (D.C. Cir. April 21, 1989) (held, awarding qualitative enhancement credit to broadcast applicants that have minority ownership does not violate the equal protection clause of the Fifth Amendment); Shurberg Broadcasting of Hartford, Inc. v. FCC, No. 84-1600 (D.C. Circuit, March 31, 1989) (held, distress sale policy violates Fifth Amendment

(continued...)

As many of you are already aware, there has been, and there continues to be a dearth of minority owners of broadcast facilities.3/ The FCC recognized this fact in 1977 when Republican-appointed FCC Chairman Richard Wiley and Commissioner Benjamin Hooks held the first FCC Conference of Minority Ownership. This historical conference brought to the forefront a host of government officials, broadcasters and lawyers,4/ and addressed the concern that minorities were not fairly represented in the broadcast marketplace. However, more importantly, the

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2/(...continued)
because program not narrowly tailored to remedy past discrimination or to promote program diversity).

3/ According to the Department of Minority and Special Services of the National Association of Broadcasters, the percentage of minority-owned broadcast facilities was 2.1% in 1986; only 1.45% of those facilities was Black-owned.

4/ FCC MINORITY OWNERSHIP TASK FORCE, CONFERENCE ON MINORITY OWNERSHIP IN BROADCASTING held April 25 and 26, 1977. (hereinafter referred to as "Conference") The Conference examined the reasons for the underrepresentation of minority owners, and explored ways to increase the number of minority owners. The conference brought together such persons as broadcasters Ragan Henry of Broadcast Enterprises, Skip Finley of Sheridan Broadcasting, Inc., Cathy Hughes formerly with WHUR-FM and now owner of WOL-AM, Washington, D.C., and Rene Anselmo with Spanish International Network; numerous government officials such as J. Clay Smith, Jr. then-Associate General Counsel at the FCC, Norman Blumenthal, then-Assistant General Counsel at the FCC, Roy Stewart, then-Chief of the Assignment and Transfer Branch, and Roderick Porter, then-Legal Assistant to FCC Chairman Richard Wiley; and other industry activists including Herbert Wilkins of Syndicated Communications, Inc., Curtis White, broadcast attorney, Harry Shooshan, then with the House Subcommittee on Telecommunications, Erwin Krasnow, then-General Counsel with the National Association of Broadcasters, Patti Grace, then-Community Affairs Director at the National Association of Broadcasters, Dr. Gloria Walker, Dean, School of Communications Clark College, Atlanta, Georgia, and Dr. Lionel Barrow, Dean, School of Communications, Howard University, Washington, D.C.

Conference inspired new Commission policies that aimed to balance the scales of representation for minorities.

In May, 1978, the Commission issued a "Policy Statement on Minority Ownership of Broadcast Facilities."5/ In the Policy Statement, the Commission acknowledged the minority enhancement credit provision espoused by the D.C. Circuit in two cases, TV-9 v. FCC and Garrett v. FCC 6/, and further stated that minority applicants engaged in broadcast hearings should be "afforded comparative merit...for construction permits where minority owners were to participate in the operation of the station."7/ However, because of the "continuation of the extreme disparity between representation of minorities in the population, and those in the broadcasting industry, ...further...action [was required]."8/ These two cases were the impetus for the Commission's policies aimed at closing the representational gap. These policies are the distress sale policy, and the tax certificate policy. Because of the D.C. Circuit's recent

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5/ See, Policy Statement, 42 RR 2d 1689 (1978) (hereinafter referred to as "Policy Statement")

6/ See, TV-9 v. FCC. 495 F.2d 929 (D.C. Cir. 1973) (held, it is consistent with maximum diversification of ownership for FCC in comparative license proceedings to afford enhancement credit to an applicant who, not as mere token, but in good faith as broadening community representation, gives local minority group media entrepreneurship); Garrett Broadcasting Service v. FCC, 513 F.2d 1056 (D.C. Cir. 1975) (held, Black ownership and participation together are likely to bring about programming that is responsive to the needs of the Black citizenry, and this "reasonable expectation" without "advance demonstration", gives it relevance).

7/ Policy Statement at 1694.

8/ Id.

decision to invalidate the distress sale policy on the grounds that it violates the Fifth Amendment's equal protection clause of the U.S. Constitution, these comments will focus specifically on this policy alone.9/

## II. ORIGIN OF DISTRESS SALE POLICY

There has traditionally been an exception to establish Commission policy against approval of an application for assignment of license when there lies a question concerning the character qualifications of the licensee. In other words, there is precedent for permitting distress sales on various grounds. See, Radio San Juan, Inc., 45 FCC 2d 375 (1974) For example, the Commission has authorized the transfer of a license to a qualified assignee where the licensee has been adjudicated as bankrupt, the individuals charged with misconduct are disassociated from station operations and will derive no benefit from the proposed transfer, and where non-renewal would result in substantial harm to innocent creditors. See, Arthur A. Cirilli, 6 RR 2d 903 (1966); and Twelve Seventy, Inc., 2 FCC 2d 973 (1966).

Historically, the Commission permits distress sales when the licensee is either bankrupt or physically or mentally disabled. In those limited circumstances, the Commission has called the requests Petitions for Special Relief; the name "distress sales"

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9/ For a legal analysis of the FCC's minority and gender enhancement policy, see, Wilson, "MINORITY AND GENDER ENHANCEMENTS: A Necessary and Valid Means to Achieve Diversity in the Broadcast Marketplace," 40 Fed. Comm. L.J. 89 (1988).

does not appear in Commission opinions until the development of Policy Statement, supra. However, the underlying principle and the procedure for effectuating Petitions for Special Relief and distress sales are essentially the same.10/

The Commission in using its equitable powers determined that when the hearing process would cause great hardship for the licensee and granting an exemption would produce only a slight reduction in the deterrent effect, renewals and assignments could be granted without a hearing despite the presence of unresolved issues concerning the character of the licensee. The typical case in which this type of situation arose was where renewal applications had been designated for hearing, the licensees suffered from physical disability which had either contributed to their alleged wrongdoing or caused the proposed hearing to be unusually burdensome for them.11/

The Commission has also used its equitable powers in permitting distress sales in certain bankruptcy cases to protect those, such as the creditors of a bankrupt licensee, likely to sustain harm from the license renewal process. Under such circumstances, the Commission would insist that the licensee

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10/ In the more recent distress sale cases, the Commission has used the term "Petition for Approval of Settlement Agreement." However, the procedure and analysis has remained constant throughout the various types of aforementioned cases.

11/ See, Tinker, Inc., 8 FCC 2d 22 (1967) (held licensee's heart condition prevents his preparation for, and participation in, the hearing); Martin R. Karig, 3 RR 2d 669 (1964) (held, congenial fused spine of licensee justified approval of transfer to aid disabled owner to support himself and family.)

agree to retire from broadcasting and reap no profit from the sale of the station. The bankruptcy exception increased the possibility of further departures from the renewal process by using benefit to others -- as opposed to harm to the licensee as the determinative criterion. The Commission also emphasized that a licensee not be given "a profitable escape route from the consequences of his wrongdoing."12/ The underlying policy which the Commission has applied in cases involving licensees in bankruptcy or receivership is that assignment will not be permitted where there are pending issues concerning a licensee's character qualifications, unless there is a showing that alleged wrongdoers will not benefit from the sale or will derive only a minor benefit which is outweighed by the equities in favor of innocent creditors. See e.g., Second Thursday Corporation, 22 FCC 2d 515 (1970), recon. granted, 25 FCC 2d 112 (1970). In so doing, the Commission has said that a licensee's insolvency and the protection of innocent creditors require a careful ad hoc balancing of competing interests in determining whether or not the Commission should authorize the assignment of a license in the face of the unresolved character issues. See, Erwin A. LaRose and Jimmy Lee Swaggart v. FCC, 494 F.2d 1145 (D.C. Cir. 1974).

Over the years, the Commission has carved out other exceptions to the policy against approval of an application for assignment of license when a question exists concerning the

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12/ Federal Broadcasting System, Inc., 60 FCC 2d 1036, 1040 (1976).

character qualifications of the licensee's principals. In Martin R. Karig, 3 RR 2d 669 (1964), the Commission permitted permittee Karig to assign his permit because of his physical disability even after an initial decision revoking a construction permit on character qualifications ground. The Commission's reasoning hinged, in large part, on the fact that Mr. Karig would not be able to educate his four children, and was giving up his only ownership interest in broadcasting and would receive no profit from the sale.

In another case, the Commission terminated a renewal hearing where the controlling owner had pleaded guilty to filing false and misleading statements with the S.E.C., had paid $3,000,000 in damages in a suit for fraudulent exchange of stock, and had pending criminal charges for five counts of committing perjury before a federal Grand Jury. See, Victor Muscat, 33 FCC 2d 568 (1972). In so doing, the Commission did not identify, per se, any mitigating circumstances. Id. at 569.

In WMOZ, Inc., 7 RR 2d 373 (1966), the Commission permitted assignment of a station even after a finding that the licensee was unqualified to be a licensee, and stated "[w]e are vested with a broad discretion in our choices of remedies and sanctions," Id. at 375, and thus it would allow the transfer because of alleged ill health. (Cf. Lorain Journal Co. v FCC, 351 F.2d 824 (1965) (held, Commission has broad discretion to determine choice of sanctions and remedies).

In Twelve Seventy, Inc., 2 FCC 2d 973 (1966), the Commission allowed assignment after hearing, notwithstanding unanswered

questions about benefits to past stockholders. In Radio San Juan, Inc., supra, there were outstanding issues that ordinarily would necessitate an evidentiary hearing, yet the Commission permitted assignment because the licensee "represented that it wants to expeditiously withdraw from broadcasting." Id. at 607-8.

In Hertz Broadcasting of Birmingham, Inc., 57 FCC 2d 183 (1976), there was a pending renewal hearing for, among other things, misrepresentations. The Commission permitted the assignment of WENN and WENN-FM by the receiver of the bankrupt licensee, in spite of the fact, that the assignment would benefit the licensee's sole shareholder, Mr. Hertz, by reducing his debts.

As noted by former Commissioner Benjamin Hooks nearly fifteen (15) years ago, "in none of the foregoing cases, which I presume represent the "exceptional circumstances" to which the majority adverts, are the public interest arguments... compelling." Northwestern Indiana Broadcasting, Corp., 60 FCC 2d 205 (1976).

In his dissenting opinion, Commissioner Hooks referred to the reason cited by the Commission for carving out exceptions to the distress sale policy. As the Commission explained: "that [it is a] rare situation in which the Commission has terminated a hearing without resolving the [outstanding] issues...[although] repeatedly [making] it clear that a hearing will not be terminated without resolving issues to determine basic qualifications, barring exceptional circumstances affecting the

licensee." Northwestern, supra, 60 FCC 2d at 210. By way of illustration, the Commission pointed out situations where the licensee is in receivership, where the wrongdoer could not benefit from a grant conditioned upon assignment of the license to a qualified applicant, and where only innocent creditors would otherwise suffer, and the respective hearing has been terminated without resolving qualifications questions. Similarly, the Commission pointed out that unusual circumstances, such as a disabling mental disease, has been considered as a pertinent factor in a licensee's capability to meet its responsibility. Catheryn C. Murphy, 42 FCC 2d 346 (1973); see Walton Broadcasting Co., 28 FCC 2d 111 (1971) and cases cited therein.

In 1976, the executive branch petitioned the Commission to establish a minority ownership policy.13/ The administration's proposal suggested that "the Commission permit sales of reduced prices of stations designated for license renewal or revocation hearings to groups of at least 50 percent minority ownership." Id. Following in the footsteps of the executive branch, the Commission held a Conference on minority ownership.14/ Soon

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13/ BROADCASTING MAGAZINE (February 6, 1978) "The Carter Plan To Get Minorities Into Ownership Of Broadcast, Cable," at p. 47. A White House statement issued at the Tuesday morning announcement of the program said "because of telecommunications' vital role in social, economic and political progress, full minority participation is a critical component of President Carter's economic and social goals... Minority ownership markedly serves the public interest, for it insures the sustained and increased sensitivity to minority audiences."

14/ See, Conference, supra, at 2.

thereafter, the Commission issued a Policy Statement endorsing a commitment to increasing significantly minority ownership of broadcast facilities.15/ Steps taken by the Commission to implement its policy included an exception to the distress sales policy for minority buyers. Id.

III. MINORITY STATUS AS EXTENSION OF DISTRESS SALE POLICY

It was not until the year 1978 that the minority factor came into play. When the Commission announced its extension of this existing policy in the Policy Statement, it specifically stated that "grants of distress sales [would be] authorized in circumstances to those now obtaining except that the minority ownership interests in the prospective purchaser [would] be a significant factor." 16/ Thus, the 1978 policy was intended to be utilized in essentially the same manner as when the licensee is either bankrupt or physically or mentally disabled.17/

IV. USE OF DISTRESS SALES AFTER 1978

The Commission's most celebrated use of distress sales, or at least in authorizing "Petitions for Special Relief," involved RKO General Inc., the former licensee of 14 radio and television stations in major markets across the country. The Commission's

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15/ See, Policy Statement, supra.

16/ See, Policy Statement at 1695.

17/ Id. A few months after the Policy Statement was released, the Commission established a minority buyer's listing whereby the FCC maintained a list of minority persons interested in purchasing broadcast facilities, and who wished to make their interests known to sellers, brokers, and other persons who were looking for station buyers. See, Establishment of a Minority Buyer's Listing, 69 FCC 2d 1553 (1978).

ultimate grants of settlement agreements for the bulk of the stations ended 22 years of protracted and highly complex litigation. As a result of the Commission's action, RKO General Inc. (hereinafter referred to as "RKO") was permitted to sell a number of its stations for less than fair market value. The Commission's authorizations put the stations in the hands of qualified licensees, and helped to avoid further litigation before the agency and the courts.18/

Although the relief sought in the RKO case was captioned as Petition for Approval of Settlement Agreement and Related Relief, the procedure used by the Commission to dispose of the case was akin to the distress sale cases. For instance, the renewal application for WGMS (AM and FM), Bethesda, Maryland19/ had been designated for an evidentiary hearing on the following issues: (i) the filing of false and misleading financial reports by the licensee with the intent to deceive the FCC, (ii) the licensee's lack of candor in providing details of an investigation into the licensee's tax deficiencies by the Internal Revenue Service, and (iii) whether the licensee engaged in unethical and fraudulent billing practices.

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18/ The stations formerly licensed to RKO and which licenses was subsequently granted approval of settlement agreements which terminated the comparative renewal proceeding against the former licensee, includes: WFYR-FM (Chicago, Illinois), 66 RR 2d 797 (1989); KRTH and KRTH-FM , (Los Angeles, California), 66 RR 2d 855 (1989); WRKO and WROR-FM, (Boston, Massachusetts), 65 RR 2d 837 (1988); WGMS and WGMS-FM, (Bethesda, Maryland), 65 RR 2d 245 (1988); and WOR and WRKS-FM, (New York, New York), 66 RR 2d 851 (1989).

19/ See, RKO General, Inc., 65 RR 2d 245 (1988)

The Commission utilized essentially the identical rationale for authorizing the sale of RKO's stations, prior to a determination of RKO's character qualifications to continue to be the license of WGMS(AM & FM). The Commission approved the settlement agreement which provided for sale of the station at 69% of its fair market value. As in the distress sale cases, the Commission's rationale for authorizing the sale was that (i) the public interest is better served by ending litigation, (ii) it provides a deterrence to licensee misconduct, and (iii) the licensee was selling the station at below the 75% benchmark used in distress sales.20/

V. COURTS DEFER TO AGENCY EXPERTISE IN ITS DISCRETION REGARDING ENFORCEMENT AND CHOICE OF SANCTIONS AND REMEDIES

The Commission is vested with broad discretion in its choice of remedies and sanctions embodied in its enforcement authority, to determine the future of licenses held by licensees that have allegedly engaged in various forms of misconduct and have had issues designated against them for hearing. Section 73.3593 of the Code of Federal Regulations states that if the Commission is

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20/ The Commission emphasized that in selling the station at 69% of its fair market value, it was "receiving significantly less than the 75% fair market value that a license would receive in a distress sale." 65 RR 2d at 246, footnote 3. However, it should be noted that the 75% figure is merely a ceiling, and that the Commission has authorized distress sale relief where the proposed sale price was less than 75% of the fair market value of the station. See Northland Television, Inc., 72 FCC 2d 51 (1979) (distress sale authorized where sale price was 54% of fair market value); Street Broadcasting Corp., 47 RR 2d 350 (1980) (distress sale authorized where sale price was 70% of fair market value); Blue Ribbon Broadcasting, Inc.) 47 RR 2d 357 (1980) (distress sale authorized where sale price was 72.6% of fair market value).

unable to make the findings specified in section 73.3591(a), it will formally designate the application for hearing on the respective issues. Section 73.3591(a), entitled "Grants Without Hearing," in essence, lists four factors that the Commission must consider before granting a broadcast instrument without a hearing. Those factors are: (i) there is not pending a mutually exclusive application filed in accordance with paragraph (b) of this section, (ii) the applicant is legally, technically, financially, and otherwise qualified, (iii) the applicant is not in violation of provisions of law, the FCC rules, or established policies of the FCC, and (iv) a grant of the application would otherwise serve the public interest, convenience and necessity.

As a preliminary matter, it is well-settled that an agency's decision not to prosecute or enforce through its administrative process is a decision generally committed to an agency's discretion. Heckler v. Chaney, 470 U.S. 821, 831 (1985) (cases cited therein). The reason for the agency being vested with such discretion is the "general unsuitability for judicial review of agency decisions to enforcement." Id.

In Heckler, supra, the Court faced a situation where an agency refused to exercise its enforcement authority, while in Shurberg, supra, the D.C. Circuit faced a situation where an agency had acted in accordance with its broad discretionary enforcement power. However, the analysis used in Heckler, supra, is instructive. Justice Rehnquist's majority opinion in Heckler, supra, teaches us that the Commission is far better equipped than the courts to deal with the many variables involved in the proper

ordering of its priorities.[21] In other words, the Commission has the power to grant a broadcast instrument without a hearing if it is able to make the finding pursuant to section 73.3591(a) of the Commission's rules that to do so results in the more efficient use of the broadcast spectrum. Absent specific guidelines to determine the definition of the "efficient use of broadcast spectrum," the Commission is left to its own devices as to how to pursue its public interest mandate.[22]

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21/ As stated in Heckler, an agency's "decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise. Thus, the Commission must not only assess whether a violation has occurred, but whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and, indeed, whether the agency has enough resources to undertake the action at all." Id. at 831-32.

22/ The majority opinion in Shurberg focused exclusively on the benefit to minorities in striking down the constitutionality of the distress sale policy. That argument is belied by the fact that: (1) the seller voluntarily decides to sell the broadcast station, (2) the seller opts not to risk his entire "property right" in the broadcast station by avoiding an evidentiary-type hearing, (3) any evidentiary hearing would be both time consuming and costly without any guarantee of a favorable outcome to the seller, (4) the seller's potential losses are offset by the sale in that he is guaranteed to receive up to a maximum of 75 percent of the fair market value of the station.

Morevoer, the majority in Shurberg advances the argument that any race-based remedy is constitutionally suspect. This commentator subscribes to the position of a noted constitutional scholar who, in rejecting such an argument, states: "It is not 'suspect' in a constitutional sense for a majority, any majority to discriminate against itself." Ely, "The Constitionality of Reverse Discrimination," 41 U. Chi. L. Rev. 723, 727 (1974). When the white seller requests distress sale relief, it consciously decides to discriminate against itself, in an attempt to minimize its losses.

VI. THE DISTRESS SALE POLICY IS LEGITIMATE

In short, the distress sale policy is not akin to establishing a quota system whereby a certain number of broadcast properties can be purchased only by minorities. That notion is belied by the history of distress sales and the numerous circumstances under which the Commission has permitted distress sales. Moreover, the Commission declined an invitation to petition for rulemaking to permit distress sales specifically to minorities.23/ Instead, the Commission has concluded that "cases should be reviewed as they arise to determine that the objective of our [its] policies will be met... Consequently, for the present, a rigid rule on such sales will not be adopted." See, Policy Statement. Stated differently, there is no guarantee that broadcast properties eligible for Petitions for Special Relief or distress sales will automatically fall into the "carved out exception" where the potential buyers would be from a minority group.

From a constitutional standpoint, in determining whether race-conscious remedies are appropriate, the court looks to several factors, including the necessity for the relief and the efficacy of alternative remedies; the flexibility and duration of the relief, including the availability of waiver provisions, and the relationship of the numerical goals to the relevant labor market. See, United States v. Paradise, 480 U.S. 149 (1987). When considered in light of these factors, it is clear that the

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23/ The Congressional Black Caucus petitioned the Commission for a rulemaking to permit distress sales to minorities.

use of the distress sale policy to effectuate the Commission's "public interest" mandate is narrowly tailored to serve its purpose.

A. Necessity for the Relief

As a preliminary matter, the grant of petitions for special relief or distress sales is among the Commission's available remedies or sanctions. Further, the choice of remedies and sanctions is a matter wherein the Commission has broad discretion. See, Lorain Journal Company v. FCC, 351 F.2d 824 (1965). Further, necessity for the relief was the conclusion rendered by a Commission Task Force set up to examine the reasons for the under-representation of minority owners and to explore ways to increase the number of minority owners. The Commission Task Force acknowledged that "acute under-representation of minorities among the owners of broadcast properties is troublesome because it is the licensee who is ultimately responsible for identifying and serving the needs and interests of his audience. Unless minorities are encouraged to enter the mainstream of the commercial broadcasting business, a substantial proportion of our citizenry will remain underserved and the larger, non-minority audience will be deprived of the views of minorities." FCC Minority Ownership Task Force, Minority Ownership Report (1978).

B. Efficacy of Alternative Remedies

The Commission has explored other alternative remedies, notwithstanding the fact that the choice of remedies is a matter within an administrative agency's discretion, before carving out another exception to the distress sale policy, whereby minority purchasers would be allowed the opportunity to buy broadcast properties from licensees willing to sell rather than go through a costly and time-consuming, evidentiary-type hearing designated to determine if the licensee was fit to remain a licensee.

The Commission in the late 1960s started to take a closer look at the role of minorities in broadcasting, as a result of the concerns expressed in the Kerner Commission Report.24/ The ensuing result was a series of Commission regulations that "forbid discrimination on the basis of race, color, religion or national origin" and another regulation that required that "equal opportunity in employment...be afforded by all licensees or permittees...to all qualified persons".25/ The Commission rules, embodying concepts of non-discrimination and affirmative action, were met with limited success. Almost a decade thereafter extreme disparity remained between the representation of minorities in the United States and in the broadcast industry.

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24/ KERNER COMMISSION, REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS (1968)

25/ See, Nondiscrimination Employment Practices of Broadcast Licensees, 13 FCC 2d 240 (1969); Nondiscrimination Employment Practices of Broadcast Licensees, 23 FCC 2d 430 (1970) (sex added as impermissible basis for discrimination); Nondiscrimination in the Employment Policies and Practices of Broadcast Licensees, 54 FCC 2d 354, 358 (1975).

Minorities constituted approximately twenty (20) percent of the population, yet controlled fewer than one percent of the almost 9,000 commercial radio stations and television stations operating in the United States.

In short, the exception to the distress sale policy was adopted only after specific findings by the Commission that ascertainment policies, and equal opportunities rules fell far short of increasing minority participation in programming and ownership.

C. Flexibility And Duration Of The Relief, Including The Availability of Waiver Provisions

The history of distress sales, also known as Petitions for Special Relief, graphically illustrates that such relief is not afforded exclusively to minorities. On the contrary, the Commission has also used the distress sale policy in those "rare situation[s] in which the Commission has terminated a hearing without resolving the issues...repeatedly [making] it clear that a hearing will not be terminated without resolving issues to determine basic qualifications, barring exceptional circumstances affecting the licensee." Northwestern, supra, 60 FCC 2d at 210. Therefore, a waiver-type provision exists in the distress sale policy as evidenced from the various situations in the past where the Commission has utilized the principle of distress sales. There is no guarantee that distress sales will be used only to increase minority ownership of broadcast properties. That notion is underscored by the Commission's decision not to petition for rulemaking on the minority distress policy. Instead, the

Commission opted to pursue the minority aspect of its distress policy on a case-by-case basis to avoid a "rigid rule on such sales."

## VII. CONCLUSION

Minorities do not have a corner on the broadcast market through distress sales. This fact is underscored by the history of the distress sale policy. In choosing to effectuate the distress sale policy, it cannot be overemphasized that the Commission is vested with broad discretion in its choice of remedies and sanctions in determining the future of licenses held by licensees that have allegedly engaged in various forms of misconduct and have had issues designated against them for hearing.

The underlying rationale and proceeding inherent in the distress sale policy has been utilized by the FCC on a case-by-case basis at least since 1964. Notwithstanding the addition of the minority factor in 1978, the policy and procedure used has, for all intents and purposes, remained constant. This is particularly evident in light of the RKO litigation. Not too much significance should be attached to the name, be it "Distress Sale", "Petition for Special Relief" or "Petition for Approval of Settlement Agreement and Related Relief." If it walks like a duck, talks like a duck, acts like a duck and looks like a duck, then it must be a duck. In other words, the distress sale policy enunciated in Shurberg v. FCC is not unique, but rather a part of the natural evolution of the Commission's policy of providing exceptions to the assignment of license when there lies questions

concerning the character qualifications of the licensee. Moreover, such relief is not afforded exclusively to minorities, and that it directly benefits non-minorities. As Professor Ely has stated, "it is not suspect in a constitutional sense for a majority, any majority, to discriminate against itself."

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**SUPPLEMENTAL COMMENTS**

**by Dr. J. Clay Smith Jr., Esquire**
**Erroll D. Brown, Esquire**
**Cynthia R. Mabry, Esquire and**
**Lisa C. Wilson, Esquire**

*The distress sale policy grew out of a dual recognition by the FCC that it could affect greater diversity in the marketplace through a distress sale policy tied to its enforcement authority. This mixed objective was thought to be well within the public interest mandate prescribed by Congress in 1934 when the Communications Act was adopted. Under the distress sale policy, the public interest was intended to be served by aiding minority entrance into the marketplace and to ease the burden of the exit of non-minorities by sparing them from the death penalty -- the revocation of their license.*/*

**ON BEHALF OF THE NATIONAL BAR ASSOCIATION 1/**

On September 15, 1989, two members of the Senate Committee on Commerce, Science, and Transportation's Subcommittee on Communications held a hearing on Minority Ownership of Broadcast Stations. Senator Daniel K. Inouye, Chairman of the Subcommittee, presided at the hearing; and, Senator Conrad Burns participated. Ten individuals representing minority- and majority-owned broadcast stations, the Federal Communications Commission, scholars, Communications lawyers and women's and minority rights advocates testified about the status of three policies that affect minority ownership of broadcast stations. 2/

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*/ Extracted from Oral Statement of Professor J. Clay Smith Jr., before the Senate Commerce Committee, Subcommittee on Communications, September 15, 1989.

1/ All views expressed in this supplemental comment are those of the authors and the National Bar Association. These comments do not express the views of the authors' respective employers.

2/ The following persons testified at the hearing: Marilyn Fife, Ph.D., Assistant Professor, Department of Radio, TV and Film, Temple University, Philadelphia, Pennsylvania; Roy Huhndorf, Chairman, Cook-Inlet Region, Inc., Anchorage, Alaska; William E.

footnote cont'd

In the last decade, the Federal Communications Commission (the Commission) implemented three policies to enhance diversity of viewpoint for the broadcast audience and to improve minority applicants' opportunity to acquire broadcast licenses. On May 17, 1978, the Commission declared that a minority enhancement credit would be one of seven factors used in a comparative hearing to determine which of two mutually exclusive applicants would provide the best practicable service to the listening and viewing public 3/

At the same time, the Commission developed two other policies. The distress sale policy permitted reduced price sales of stations that have been designated for renewal or revocation hearings to minority-owned or minority-controlled purchasers. Tax certificates were also offered to broadcasters who transferred or assigned their stations to potential licensees with significant minority ownership interests. 4/

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Kennard, Esquire, Washington, D.C.; Patricia Niekamp, President, American Women in Radio and Television, Washington, D.C.; John Payton, Esquire, Washington, D.C.; Richard Ramirez, President, Astroline Communications, WHCT-TV, Hartford, Connecticut; Alan Shurberg, Shurberg Broadcasting of Hartford, Inc., Hartford, Connecticut; Dr. J. Clay Smith Jr., Professor Law, Howard University School of Law, Washington, D.C.; Percy Sutton, Chairman, Inner City Broadcasting, New York, New York; and, James L. Winston, Esquire, Executive Director and General Counsel, National Association of Black Owned Broadcasters, Washington, D.C.

3/ See Policy Statement on Minority Ownership of Broadcast Facilities, 68 FCC 2d 979, 982 (1978). The Commission's Administrative Law Judges had already commenced granting credit to minority applicants in comparative hearing proceedings because the United States Court of Appeals for the District of Columbia Circuit had mandated it in TV 9 Inc. v. FCC, 495 F.2d 929 (D.C. Cir. 1973), cert. denied, 418 U.S. 986 (1974). The court held that such credit should be given "only when minority ownership is likely to increase diversity of content . . ." 495 F.2d at 938.

Nineteen years after the policy was announced, the United States Court of Appeals for the District of Columbia Circuit concluded that this policy is constitutional. West Michigan Broadcasting Co. v. FCC, 735 F.2d 601 (D.C. Cir. 1984), cert. denied, 470 U.S. 1027 (1985) (license to Black woman who received merit for minority ownership upheld).

4/ 68 FCC 2d at 983.

At the hearing on September 15, Senator Inouye announced the focus of the conference: (1) codification of the definition of the term "minority," (2) codification of policies which ensure minority ownership, and (3) expedition of the "slow and tedious" comparative process. Senator Inouye expressed further concern about sham minority licensees who are depriving minorities of benefits the Commission had intended for minorities. Sham operators obtain licenses by misrepresenting their minority interests and/or the status of minority employees at the broadcast station.

Unfortunately, in recent years the Commission has not actively enforced its minority policies. In Steele v. FCC, 770 F.2d 1192 (D.C. Cir. 1985), and Shurberg Broadcasting of Hartford, Inc. v. FCC, 876 F.2d 901 (D.C. Cir. 1983), the Commission voluntarily requested a remand of the cases for reevaluation of its minority enhancement policies.

We applaud the Subcommittee for its interest in enacting legislation to codify policies that are so important to the general public. Although the policies have been in effect for over ten years, they are being attacked by the courts and others who do not fully understand the purpose or the true beneficiaries of the policies. This year, the Court of Appeals for the District of Columbia Circuit ruled that distress sales violate the Fifth Amendment because the policy did not remedy past discrimination or promote diversity of programming. 5/ Five years earlier, the same court concluded that "[p]romoting minority ownership, if linked to minority management, is desirable as a way of increasing the overall diversity of prospectives represented in the broadcast mass media." 6/

Other advocates who argue against enforcement of these policies contend that the policies are unduly burdensome on non-minorities since distress sales and tax certificates favor award of licenses to minorities to the exclusion of qualified non-minorities; and, non-minorities lose money on these deals. When the Commission articulated these policies, it certainly did not intend to create financial hardships for non-minorities. In fact, the Commission commented that the licensee who was in danger of

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5/ Shurberg Broadcasting of Hartford, Inc. v. FCC, No. 84-1600 (D.C. Cir. Mar. 31, 1989).

6/ West Michigan Broadcasting Co. v. FCC, 735 F.2d 601, 609 (D.C. Cir. 1984).

losing his license would probably receive a higher distress sale price for his license than he would receive for unlicensed equipment. 7/ Hence, the policy advanced a dual benefit to minorities and non-minorities.

Non-minority broadcasters are not obligated or otherwise compelled to engage in distress sales or to seek tax certificates. Tax certificates and distress sales are offered to "encourage broadcasters to seek out minority purchasers," 8/ and to benefit non-minorities in real dollars.

Furthermore, the Commission explicitly stated that any minority applicant considered under either of these policies must still meet the Commission's qualifications. 9/ For instance, with respect to the minority enhancement credit, an applicant's minority status is only one of seven factors which the Commission reviews to determine whether an applicant is qualified.

Moreover, large numbers of minorities are not receiving benefits from either of these policies. Only thirty-eight distress sales have been performed since that policy was announced in 1978.

At the end of the hearing on September 15, Senator Inouye announced that for sixty days, he would keep the record open for additional comments from interested parties. Senator Inouye specifically invited supplemental remarks from Professor J. Clay Smith Jr., Professor of Law, Howard University School of Law, and Dr. Marilyn Fife, Assistant Professor, Temple University.

The Commission is the only agency that has access to vital data that would resolve issues regarding diversity of programming and the economic value of these policies to non-minorities as well as the diversity values as relates to minorities. The National Bar Association proposes that the following questions be submitted to the Commission. These questions are derived from an analysis of the comments submitted at the September 15 hearing The answers will support the reasonableness of the position that non-minorities do in fact benefit from the Commission's minority ownership policies, and more specifically, the distress sale policy.

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7/ "In order to provide incentive for broadcasters opting for this approach, we would expect that the distress price would be somewhat greater than the value of the unlicensed equipment, which could be realized even in the event of revocation." 68 FCC 2d at 983 n.21 (citations omitted).

8/ Id (emphasis added).

9/ Id.

**OWNERSHIP OF STATIONS**

1. How many broadcast stations exist in the United States? Please specify type (i.e., radio, television).

2. How many broadcast stations have minorities in management or other policy decision-making positions?

3. How many broadcast stations are owned by minorities? For each minority owner, please state:

(a) the ethnic background of the owners;
(b) date original license was issued;
(c) city and state where station is located.

4. How many of the minority owned or minority-controlled broadcast stations were purchased after May 1978?

5. How many and what percentage of the total applicants involved in comparative hearings requested and were granted an enhancement credit for minority participation?

**DISTRESS SALES**

1. What was the purchase price of each of the thirty-eight broadcast stations that have been sold since 1978 pursuant to the distress sale policy? What was the fair market value of each of these stations?

2. Describe the regularity of the use of the Minority Buyers' List by sellers of broadcast stations.

5. Does the Commission continue to refer to the Minority Buyers' Listing when broadcast stations are sold? If so, what procedure does the Commission follow to utilize this information?

6. How are potential minority purchasers notified that the Minority Buyers' List exists?

7. How many potential minority buyers are on the current list?

8. How often is the list of potential minority purchasers updated?

**TAX CERTIFICATES**

1. How many tax certificates have been issued to assignors or transferrers for sales to purchasers with significant minority interests? For each certificate issued, please state:

(a) the date of each certificate;
(b) the ethnic origin of each minority purchaser;
(c) the value of the financial benefit to the seller.

2. How many times has the Commission denied a certificate to a seller when the proposed minority purchaser did not meet Commission qualifications?

**SHAM OPERATIONS**

1. Describe how often the Commission has discovered that an applicant has incorrectly stated its minority interests?

2. What are the circumstances of these sham operations? (i.e., no minority owners, no minority management, employees are employed solely for the purpose of obtaining a license and they are discharged within a short time after the applicant is licensed)

3. What policies has the Commission promulgated to avoid licensing sham operations? Discuss in detail.

4. Has the Commission taken actions to discipline licensees and applicants who have misrepresented their minority ownership interests?

Senator INOUYE. All right. Thank you very much.
May I now call upon Mr. Ramirez?

**STATEMENT OF RICHARD RAMIREZ, PRESIDENT, ASTROLINE COMMUNICATIONS**

Mr. RAMIREZ. Mr. Chairman, Senator, good morning.

As an initial matter, I would like to salute you for holding this session today to draw attention to the status of minority ownership in telecommunications today.

Given recent conflicting opinions from the U.S. Court of Appeals, D.C. Circuit, about different aspects of the FCC's minority ownership policies, and given inconsistent guidance about the status of such policies at the Commission itself, it is certainly appropriate and absolutely crucial for these sessions to be held.

Astroline also has a special interest in today's proceedings. We are a party to the *Shurberg Broadcasting of Hartford, Inc.* v. *FCC*, in which the Court of Appeals, on March 31st, 1989, found that the FCC's distress sale policy is unconstitutional.

This case commenced more than four years ago after Astroline entered into agreement for the purchase of WHCT-TV channel 18 in Hartford, Connecticut, upon the voluntary election of the seller, Faith Center, to avoid revocation proceedings.

After the FCC granted the assignment, Shurberg Broadcasting, a disgruntled party that had been denied standing to initiate a comparative renewal proceeding, filed suit to have the grant of the assignment set aside.

Litigation is always difficult, but one of the unusual circumstances that has occurred during the course of our proceeding was that the FCC, after ardently defending its policy on the distress sale for two years, requested a remand of the case, because it was planning to review the distress sale and other minority ownership policies.

It was not until after Congress told the Commission that Congress did not want the distress sale and other policies to be abandoned, that the Commission reported back to the court that it reaffirmed the utilization of the distress sale policy in particular.

Now, however, the Court of Appeals has spoken, holding that the distress sale policy violates the Fifth Amendment because the program is not narrowly tailored to remedy past discrimination or to promote program diversity.

Astroline remains convinced that the distress sale policy is a viable tool for furthering minority ownership and we are considering all options available to us, including review by the Supreme Court.

In this regard, Astroline is prepared to permit its experience as an operator of WHCT to serve as an example of the public interest benefits that flow from minority ownership. The nexus between minority ownership and program diversity that the court wanted to see in the Shurberg case is evident in the operation of channel 18.

Until Astroline became the licensee of WHCT, the station operated as a 24-hour-a-day satellite outlet, with programming consisting solely of the repetition of offerings from Dr. Reverend Eugene Scott.

Astroline, however, regularly broadcasts varied programming to address the needs and interest of its community. WHCT regularly scheduled bilingual programs, including several aimed at children and public service announcement regarding cultural and social issues.

The station also provides service to the substantial black community in Hartford. Further, we have increased the diversity program offerings in the market in non-minority programming by airing specials for children and sports programming that would not otherwise be available.

Astroline's management, because of its Hispanic roots, offers programming that assists in the assimilation of Hispanics, provides role models for blacks and others, and educates the Anglo market and others about Hispanic life.

These programs have contributed greatly to breaking down cultural banners. Astroline also produced the only locally-produced Spanish-language program on AIDS in the Connecticut market.

In addition to adding to diversity through programming, WHCT has also had a tremendous impact in increasing minority employment in the marketplace, particularly in the management categories.

Before we acquired channel 18, there were no Hispanic managers in the Hartford market. Under our operation, we were able to find qualified, experienced, and capable minority personnel including myself, who served as general manager; Terry Plannell, as station manager; Migdalia Vasquez-Fernandez as director of community affairs; Daniel Webb, as national sales manager; Alajeri McDonald, as assistant chief engineer; P.J. Lewis, sales manager; and Leonard Colon, producer.

We actively sought to provide employment opportunities for minorities in our hiring and recruiting practices. The fact that some of these Astroline employees have gone on to employment at other broadcast stations serves as proof of our success in this area.

We know that there are more stories out there about the benefits that can be derived from minority ownership. We were given our opportunity to have an impact on the Hartford community because of the distress sale policy. It was through this creative program that the son of Cuban emigre and a Puerto Rican, who was reared in the Fort Apache of New York City, was able to have involvement in media ownership and management.

Mr. Chairman, Senator, in conclusion, the FCC's minority ownership policies were bold initiatives that were specifically designed to address the problem of the dearth of minority ownership of mass media facilities. With changes in the officials at the FCC, support for the programs have been uneven at best and most often lacking in fervor. This lack of support has, of course, been noted by the courts.

Now Astroline and many others are concerned that the policies will be abandoned completely, unless this Congress issues clear statements of support and adopts legislation based upon findings from hearings, such as that being held today, that makes the distress sale policy, tax certificate program, and other steps intended to further minority ownership, a mandate of law.

I appreciate the opportunity to appear before you today. And again, we applaud the members of this committee and the staff for holding this needed discussion about the status of minority ownership and the steps that must be undertaken to provide support thereafter.

Senator INOUYE. All right, thank you very much, Mr. Ramirez.

We have to return to the floor at this time, because there is a vote pending. And I will be right back.

[Recess.]

Senator INOUYE. Now, I call upon Mr. Shurberg.

## STATEMENT OF ALAN SHURBERG, SHURBERG BROADCASTING OF HARTFORD, INC., HARTFORD, CT

Mr. SHURBERG. Thank you, Mr. Chairman. I appreciate the opportunity to share with you the insights, which I have gained in my own personal experience, relative to race-based preferential treatment in minority ownership of broadcast stations.

My particular experience is described in some detail in the recent U.S. Court of Appeals decision in *Shurberg Broadcasting of Hartford* v. *FCC.*

The FCC implemented a variety of broadcast licensing devices in which applicants are systematically discriminated against based on the color of their skin or their national heritage.

Two of these devices, the minority distress sale policy and the issuance of tax certificates in certain circumstances, were made available only in situations involving enterprises supposedly owned and controlled by minorities.

According to the FCC, minorities are considered to be not only black, but also Eskimo, Aleutian, American Indian, anyone with a Spanish-sounding name, or anyone from Asia. That is, the availability of relief under the minority distress sale policy and the issuance of tax certificates was strictly limited to minority-only situations.

Recently, the Supreme Court has on at least two occasions addressed the question of the role of societal discrimination as a basis for discriminatory treatment based on race. In both the Wygant case, and most recently in Croson, the Court specifically concluded that the vague notion of societal discrimination is not an adequate basis to support discriminatory conduct on the part of a governmental agency.

The subcommittee this morning has been presented with various anecdotal descriptions supposedly illustrating discrimination, but such anecdotes are simply no substitute for actual proof.

The FCC's original definition of a minority required that the minority control at least 51 percent of the enterprise, but this was arbitrarily reduced by the FCC in 1982 to 21 percent control. Astroline, the purportedly minority-controlled entity, consisted of a limited partnership, which met the 21 percent figure, rather than the actual control of at least 51 percent recognized by the original FCC requirements.

Astroline fell even farther short of any real minority control. According to state documents, a supposed minority partner, Mr. Ramirez, whose claim as a minority was based solely on his Spanish-

sounding last name, had contributed a mere $200 to the partnership's capital, while non-minority owners have advanced over $24 million, representing more than 99.99 percent of the company's capital.

Astroline has been in bankruptcy for almost a year. In connection with the bankruptcy proceeding, counsel for the partnership's creditors has represented that the station was controlled on a daily basis by the non-minority limited partners. This apparently included an arrangement where nearly all of the station's receipts were collected by a lockbox arrangement and routinely wire transferred to the limited partner's bank in Boston.

According to the creditor's counsel, the picture that emerges from that is one of absolute, total control by the non-minority limited partners over every single dollar coming in and out. Every decision of any consequence was made, in fact, by the non-minority, so-called limited partners.

It was also indicated by the creditor's counsel that the bills of the station were not being paid by the station itself, but rather, by the Astroline Corporation and the Astroline Company, separate and distinct entities, neither of which are minority controlled.

Creditors' claims in the bankruptcy proceeding amount to more than $36 million. Virtually none of the claims, including trade debt, are to minority-controlled firms, dispelling the myth that minorities will tend to do business with other minorities, at least insofar as the Hartford market is concerned.

Assuming for the sake of the argument, the premise that the partnership was, in fact, minority controlled, it bears noting that a supposed controlling minority had made no claim that he had either been a victim of discrimination to the FCC or had otherwise been disadvantaged because of his ethnic heritage. Nor could Mr. Ramirez hardly claim to be disadvantaged. He attended Boston College on a full scholarship and has worked at six-figure-type jobs prior to being plucked as the requisite token for the Astroline formation.

Prior to and during the supposedly minority-controlled partnership's tenure as operator of channel 18, Hartford had both a full-time Spanish television outlet and a full-time FM Spanish-language radio station. Other radio and television stations also regularly aired programming in Spanish.

Thus, if the grant of the distress sale to a partnership, purportedly controlled by a Hispanic, was intended to result in greater diversity of programming by providing Spanish-language broadcasting, it is apparent that such programming was already readily available in the particular Hartford market.

More recently, the station has shifted its programming. It presently airs 17 hours a day or more of block-paid programming, principally consisting of the Home Shopping Club, which is a continuous video commercial, which specializes in selling trinkets and costume jewelry, and other programs that push miracle baldness cures and dubious diet programs.

None of the programming is in Spanish or otherwise targeted towards minority audiences.

Unless one accepts the premise that ethnic groups are entitled to results based on a percentage of the economic pie, an argument ex-

pressly rejected by the Supreme Court, there was no justification to use racial preferences in the Hartford market.

Cook Inlet, another supposed minority broadcaster with a Connecticut television station, is yet another example of a structured organization, set up to take advantage of policies preferring certain races.

According to documents filed with the FCC by Cook Inlet, one out of over 100 employees at its New Haven television station, a part-time technical employee, is the only employee that has claimed to be of Eskimo or Aleutian origin. The station has no on-air Eskimos; it broadcasts no programming targeted towards Eskimos.

The station's operation is yet another example of the lack of any nexus between minority ownership and minority programming, and another example of an enterprise set up for the express purpose of taking advantage of opportunities reserved for minorities.

Cook Inlet also operates WPGC AM and FM here in the Washington area. The lack of Eskimo presence in the Washington area and the lack of Eskimo programming on the Washington stations is worth noting.

Congress has a variety of color-blind mechanisms in which the percentage of minority ownership may be increased. For example, former FCC Chairman Fowler proposed the funding of revolving loans for the purchase of stations based on a color-blind criteria.

Given that the possibility exists for legislation to increase the opportunities to all Americans, without regard to one's race or color, it is unlikely that the Supreme Court will uphold the legality of any preference scheme based on race, unless all alternatives have been first exhausted.

I do not question the intention of those who embrace set-aside programs, but their effects are no less diminished by creating a little discrimination in order to purportedly eliminate another discrimination.

There is simply no legitimate basis for considering Bill Cosby, Oprah Winfrey or Geraldo Rivera as being disadvantaged, so as to need to invoke preferential treatment, which discriminates against other people based on the color of their skins.

These remarks are in no way an indictment of minority ownership in broadcasting facilities, but rather, of policies which result in the preferential treatment in the licensing process, treatment which is repugnant to a society where all persons are supposedly created equal.

Thank you.

[The statement follows:]

REMARKS OF ALAN SHURBERG
BEFORE THE TELECOMMUNICATIONS SUBCOMMITTEE OF THE
SENATE COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION
SEPTEMBER 15, 1989

Mr. Chairman, Members of the Subcommittee, I appreciate the opportunity to share with you the insights which I have gained in my own personal experience relative to minority ownership of broadcast stations and, particularly, various policies intended to encourage such ownership. My particular experience is described in some detail in the decision of the U.S. Court of Appeals for the District of Columbia Circuit in Shurberg Broadcasting of Hartford, Inc. v. FCC, 876 F.2d 902 (D.C. Cir. 1989). That case is still technically subject to judicial review, and I certainly do not wish or expect my appearance here to be misinterpreted as inviting any Congressional action designed to alter or affect that case: any such action would be inconsistent with the proper separation of powers and due process of law required by the Constitution. See Pillsbury Co. v. FTC. However, to the extent that the Subcommittee may be interested in considering minority ownership policies to be applied in the future, I offer the following remarks which may provide useful cautionary insight.

Since the earliest days of governmental regulation of the radio spectrum, Congress, the courts, and the FCC have all struggled to insure that the airwaves, a public resource which broadcasters are entrusted to operate in the public interest, will be utilized in a manner which serves all its citizens.

Some ten years ago, in apparent pursuit of that goal, the Federal Communications Commission ("FCC" or "Commission") implemented a variety of broadcast licensing devices in which applicants are systemically treated differently based on, inter alia, the color of their skin or their national heritage. Two of these devices -- the minority distress sale policy and issuance of tax certificates in certain circumstances -- were made available only in situations

involving enterprises supposedly owned and controlled by "minorities". (According to the FCC, "minorities" triggering such policies are Black, Hispanic Surnamed, American Eskimo, Aleut, American Indian, Asiatic American extraction). That is, the availability of relief under the minority distress sale policy and the issuance of tax certificates was strictly limited to "minority only" situations.

The third policy, that of preferential treatment in the awarding of comparative preferences, has often been referred to a "plus factor" first commonly described in Justice Powell's opinion in the Bakke case. This third policy permits minorities and non-minorities to compete for new broadcast licenses, with the understanding that minorities may be entitled to some preferential treatment in the final comparative analysis. In other words, while the benefits of this comparative preference policy are available only to minorities, the policy itself does not, on its face, preclude non-minorities from the licensing process, unlike the minority distress sale policy.

Because all of these policies result in governmentally-sanctioned racial discrimination, they are, as a threshold matter, constitutionally suspect. The most thorough and thoughtful analyses of the constitutional considerations relating to these policies are included in the detailed pleadings submitted by the Department of Justice in the FCC's Inquiry (since abandoned pursuant to Congressional directive) into its minority ownership policies, and in Winter Park Communications v. FCC, No. 85-1755 (D.C. Cir. April 21, 1989). For the Subcommittee's benefit I am including copies of those pleadings as Attachments F to my written comments. While I do not believe I can provide any better discussion of the legal factors at issue, I do believe that I can provide some factual background which demonstrates the fallacious nature of the general justifications offered in support of these discriminatory

policies.

Several justifications have been advanced for the FCC's racially discriminatory programs. These include the following notions:

1. Past discrimination has resulted in a disproportionate skew in the licensing of broadcast stations, meaning that "minorities" have somehow been prevented from receiving a "fair share" of the broadcast stations.

2. Different ethnic groups are entitled as a matter of right to a percentage of stations based on population, i.e., if an ethnic group comprises 10 per cent of the population, it is entitled as a matter of right to ten per cent of the broadcast stations. This is sometimes referred to as a right to a percentage of the pie. A corollary to this theory is that minority-controlled enterprises will patronize other minority-controlled enterprises, thus lending strength to the overall minority economy.

3. Only ethnic groups air programs targeted toward their own ethnic origin. The thought here is that, in order to assure "diverse" (i.e., "ethnically diverse") programming, broadcast stations must be licensed to minority entities.

Now I want to be clear that I do not object to proper efforts made to assure diversity of media ownership. After all, such diversity is a positive influence on society. But that goal cannot properly be achieved by creating set-asides and denying participation based on one's race. Such governmental discrimination cannot stand up to scrutiny as a matter of law or of social policy. The factual circumstances in the Shurberg case, and the Hartford/New Haven market generally, undermine those assertions, as discussed below.

## I. THERE HAS BEEN NO EVIDENCE OF SYSTEMIC DISCRIMINATION IN BROADCASTING.

Recently, the Supreme Court has on at least two occasions addressed the question of the role of "societal discrimination" as a basis for discriminatory treatment based on race. In both Wygant v. Jackson Board of Education, 476 U.S. 267 (1986), and most recently in City of Richmond v. J.A. Croson Co., 57 U.S.L.W. 4132 (1989), the Court specifically concluded that the vague notion of "societal discrimination" is not adequate to support discriminatory conduct

on the part of a governmental agency. Rather, some particular discrimination must be demonstrated, as a matter of record, before such race-based policies can pass constitutional muster.

Three court cases recently have considered the discriminatory nature of the FCC's minority ownership policies. These include: Steele v. FCC, 770 F.2d 1192 (D.C. Cir. 1985), vacated, which concerned preferential treatment of women as a "plus factor"; the Shurberg Broadcasting case, in which the minority distress sale policy was declared unconstitutional inter alia because it forecloses those not considered to be a "minority" from applying; and Winter Park Communications v. FCC, in which the Court upheld preferential treatment to a "minority" in part because the treatment was a "plus factor". The supposed "minorities" in both Shurberg and Winter Park have Spanish-sounding last names.

The FCC had stated in Steele that,

> the Commission believes that both gender and racial preference schemes conflict with equal protection standards under the Constitution.

Brief of FCC on Rehearing En Banc in Steele v. FCC at 13 (No. 84-1176).

Nowhere in connection with either case had there been the slightest indication that the FCC had engaged in conduct which could even arguably be considered to be discriminatory.

It is possible, perhaps even likely, that the Subcommittee this morning may be presented with various anecdotal descriptions supposedly illustrating discrimination by the FCC. But such anecdotes are simply no substitute for actual proof, especially when important constitutional interests are at risk. Indeed, any such incidental or anecdotal testimony must be weighed carefully against one undeniable fact: to my knowledge, there has never been any substantive litigation brought against the FCC based on allegations of discriminatory conduct

against "minorities" by the Commission in its broadcasting licensing activities. The lack of any such litigation is a telling indication of the actual lack of discrimination on the part of the FCC.

II. THE COMMISSION'S DEFINITION OF "MINORITY CONTROL" FOR LICENSING PURPOSES DOES NOT ADVANCE ANY VALID GOVERNMENTAL INTEREST.

The FCC's minority distress sale policy, first established in 1978, 66 F.C.C 2d 979, allowed a broadcaster faced with the prospect of losing its license in a hearing to sell out to a "minority controlled" owner. The original definition required that the "minority" control at least 51 per cent of the enterprise. The 51 per cent requirement was arbitrarily reduced by the FCC in 1982, 92 F.C.C 2d 849, to 21 per cent. But even that dramatically watered-down concept of "control" is subject to abuses which deprive the notion of "control" of any real meaning. The purported "minority" broadcaster in the Shurberg Broadcasting case is an ideal illustration what I am talking about here.

The purportedly "minority-controlled" entity in that case consisted of a limited partnership which supposedly met the 21 per cent figure rather than an actual control of at least 51 per cent recognized by the original FCC requirements. On its face this partnership fell far short of the standards recognized by the Supreme Court in Fullilove, i.e., that a Minority Business Enterprise be at least 51 per cent controlled by a "minority" and that the capital formation of the company track the percentage of ownership. For example, if a "minority" contributed one percent of the capital of the enterprise, it should only be allowed to claim one per cent as "minority" controlled.

But the supposedly minority-controlled partnership in the Shurberg Broadcasting case fell even farther short of any real minority control. According to the records of the Secretary of State for the Commonwealth of Massachusetts, and included here as Attachment A,*/ the

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*/ The attachments were not reproducible.

supposed "minority" partner, Richard Ramirez, whose claim as a "minority" was based solely on his Hispanic surname, has contributed, in toto, a mere two hundred dollars ($200.00) of the partnership's capital, while non-"minority" partners have advanced over twenty-four million dollars ($24,000,000.00), representing more than 99.99 per cent of the company's capital. The following information is taken from official state records provided by the partnership:

Astroline Communications Company Limited Partnership
(Debtor in Possession)

Schedule of Ownership by Capital Contributions

| Minority/ Non-minority | Partner | Total Capital Contribution | Percentage of Total Capital |
|---|---|---|---|
| NONMINORITY | Astroline Company, Inc. | $21,195,585 | 87.19% |
| NONMINORITY | Martha and Robert Rose | $1,556,699 | 6.40% |
| NONMINORITY | Thelma Gibbs | $1,556,699 | 6.40% |
| NONMINORITY [1] | WHCT Management Inc. | $90 | 0.00% |
| *Minority | Richard Ramirez | $210 | 0.00% |
| | | $24,309,283 | 99.99% |

*Minority Status as Hispanic-surnamed claimed by Astroline

It is a basic truth of the commercial world that the party controlling the pursestrings in fact controls the business, irrespective of any fancy partnership structures. The validity of that principle is illustrated in the Shurberg Broadcasting case as well. The supposedly minority-controlled partnership there has been in bankruptcy since December, 1988. In connection with the bankruptcy proceeding, counsel for the partnership's creditors has represented to the

[1] When the partnership was formed, WHCT Management, Inc. was a purely non-minority company. In late 1988 – some four years after the FCC's decision – control of that corporation was supposedly transferred to a purportedly minority individual. Shurberg Broadcasting has challenged this transaction before the FCC, which has yet to rule on the matter. But even if WHCT Management, Inc. is deemed, arguendo, to be minority-controlled at this time – and I certainly do not concede that point – it was clearly not minority-controlled at the time that the FCC decided to treat the partnership as being "minority-controlled" for the purposes of the minority distress sale policy.

bankruptcy judge that the station was controlled on a daily basis by the non-"minority" "limited partners". This apparently included an arrangement where nearly all of the station's receipts were collected by a lock box arrangement and routinely wire transferred to the limited partner's bank in Boston. According to the creditors' counsel,

> Specifically, all the revenues that have come in over the four years [to the partnership] from the operations of the station have not been within the control of the station, not have been in control of the station manager [Richard Ramirez], not really in the control of any employee of the station. All those funds have been remitted to a lock box at a bank, at a local bank, which the [supposed minority controlled] Debtor had no access to. All those funds were then routinely wire-transferred to banks in Boston where the [non-minority] Astroline Company [a separate, and distinct company from Astroline Communications Company Limited Partnership, the supposedly minority-controlled partnership] is located and where Mr. Sostek [not a "minority"] is located and where Mr. Boling [not a "minority"] is located, and every dollar that came in routinely was routed up to Boston [to the non-"minority" "limited" partners]. [emphasis supplied].
>
> The picture that emerges from that is one of absolute total control [by the non-minority "limited" partners] over every single dollar either coming in or going out.
>
> On paper you've got people who have put up all the money and who funded the entire deficit for four years are being listed as limited partners, but then you come to the reality of the situation for bankruptcy purposes and you find that every single dollar was controlled from [the non-"minority" "limited" partners].
>
> Every decision of any consequence was made in fact, by the [non-"minority"] so-called limited partners

It was also indicated by the Creditor's Counsel that the bills of the station were paid not by the station, but by the Astroline Corporation and the Astroline Company, separate and distinct entities neither of which are "minority" controlled. A copy of the relevant remarks are included herein as Attachment B. [2]

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[2] From the foregoing it is clear that the supposedly "minority-controlled" partnership in Shurberg Broadcasting fails the test set forth in Fullilove for determining whether a business is a bona fide minority enterprise because: 1) by the terms of its charter of formation it conceded it was not at least 51 per cent "minority" controlled; 2) the attribution accorded to the partners was not done in accordance with their respective actual capital contributions which were at least 99.9 per cent contributed by non-"minority" partners;, 3) the company was formed

Further, the record indicates that, even if the partnership was "minority-controlled", it did not provide any particular economic boost to other minority enterprises. Creditors' claims in the bankruptcy proceeding amount to more than thirty-six million dollars ($36,000,000.00). Virtually none of the claims, including trade debt, are to "minority" controlled firms, dispelling the myth that "minorities" will tend to do business with other "minorities". The bankruptcy claims register has been attached here as Attachment C.

Assuming arguendo the premise that the partnership was, in fact, "minority-controlled", it bears noting that its supposedly controlling "minority" made no claim either that he had been a victim of discrimination of the FCC or that he had been otherwise disadvantaged because of his ethnic heritage. Nor could Richard Ramirez hardly claim to be disadvantaged. He attended Boston College on a full football scholarship, and was working at six-figure type jobs prior to being plucked at the requisite token for the Astroline formation.

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for the express purpose of "taking advantage" of the distress sale policy, as opposed to an on-going enterprise referred to in Fullilove.

The Court in Fullilove specifically restricted its opinion to bona fide "minority" controlled firms

> An MBE [Minority Business Enterprise] is bona fide if the minority group ownership interests are real and continuing and not created solely to meet 10% MBE requirements. For example, the minority group owners or stockholders should possess control over management, interest in capital and interest in earnings commensurate with the percentage of ownership on which the claim of minority ownership status is based...

448 U.S. 448. The Court also noted the facial attack on the policy, specifically reserving the possibility of a separate determination on an individual, as-applied basis. It is also worth noting that the Fullilove opinion constituted a plurality, and not a majority, of the Court.

III. FACTUAL CIRCUMSTANCES PRECLUDE A FINDING THAT MINORITIES PROGRAM FOR MINORITIES OR THAT MINORITY PROGRAMMING IS UNDER-REPRESENTED.

Prior to, and during the supposedly "minority-controlled" partnership's tenure as operator of Channel 18, Hartford had both a full-time Spanish television outlet, and a full-time FM Spanish language radio station. Other radio and television stations had also regularly aired programs in Spanish. Thus, if grant of the distress sale to a partnership purportedly controlled by an Hispanic was intended to result in greater diversity of programming by providing Spanish-language broadcasting, it is apparent that such programming was already readily available in the particular Hartford market.

Further, the record of the Shurberg Broadcasting case demonstrates that the assumption that supposedly minority ownership will lead to minority-oriented programming is simply wrong. In October, 1986 -- approximately 18 months after it acquired the station through the distress sale process -- the purportedly minority-controlled partnership voluntarily advised the FCC of its programming performance. That report reflected only a minimal amount (in the range of less than an hour or so per day on average) of Spanish-language programming obtained from syndicators. Surprisingly, the partnership also claimed to be providing programming directed to other, non-Hispanic minorities. Of course, if a Hispanic licensee can be said to provide programming for, say, Blacks, why cannot a white licensee provide programming for Hispanics, Blacks or any other ethnic group? [3] Ignoring this conceptual difficulty, the partnership proudly listed its minority programming -- a syndicated program akin to "Entertainment Tonight" dealing with Black personalities, "Soul Train" (a

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[3] In this regard, it should be noted that both the Spanish-language TV station and the Spanish-language radio station are owned by white, non-"minority" owners.

predominantly Black teen-age dance program akin to "American Bandstand"), and re-runs of "Julia", a situation comedy concerning a Black nurse.

More recently, the station has shifted its programming. It presently airs 17 hours a day or more of block paid programming, principally the Home Shopping Club (a continuous video commercial which specializes in selling trinkets and costume jewelry) and other programs that push miracle baldness cures and dubious diet programs. None of the programming is in Spanish or otherwise arguably targeted towards "minority" audiences. The partnership's EEO employment report filed with the FCC similarly does nothing to bolster the notion of enhanced sensitivity to the community. A copy of its most recent report is included as Attachment D.

This programming performance hardly justifies the constitutionally suspect race-based distress sale policy. Indeed, Hartford viewers have gained nothing from the partnership's operation whether or not the partnership is deemed to be "minority-controlled". Unless one accepts the premise that ethnic groups are entitled to results based on a percentage of the pie theory, an argument expressly rejected by the Supreme Court in NAACP v. FPC, there was no justification to use racial preferences in the Hartford market.

## IV. ESKIMOS AND ALEUTS IN THE HARTFORD/NEW HAVEN AND WASHINGTON, D.C. MARKETS

Cook Inlet Communications is yet another example of a structured organization set up to take advantage of policies preferring certain races. According to documents filed with the FCC by Cook-Inlet, and in part included as Attachment E, one out of over 100 employees at the New Haven station, a part-time technical employee, is claimed to be an Eskimo. The station has no on-air Eskimos, and it broadcasts no programming targeted towards Eskimos. The station's operation is yet another example of both the lack of any nexus between "minority"

ownership and "minority" programming, and another example of an enterprise set up for the express purpose of taking advantage of opportunities reserved for "minorities".

Cook-Inlet also operates WPGC-AM and WPGC-FM here in the Washington area. The lack of Eskimo presence in the Washington area, and the lack of Eskimo programming on the Washington stations is worth noting.

The Supreme Court spoke to this issue of using national aggregate data as a basis to justify discriminatory conduct on the part of the government:

> Under Richmond's scheme, a successful Black, Hispanic, or Oriental entrepreneur from anywhere in the country enjoys an absolute preference over other citizens based solely on the their race.
>
> We think it obvious that such a program is not narrowly tailored to remedy the effects of past discrimination.

Croson at 729.

V. RACE NEUTRAL SCHEMES TO INCREASE MINORITY OWNERSHIP

Congress has a variety of color blind mechanisms in which the percentage of "minority" ownership may be increased. For example, former FCC Chairman Fowler proposed the funding of revolving loans for the purchase of stations based on a color-blind criteria. Given that the possibility exists for legislation to increase opportunities to all Americans, without regard to one's race or color, it is unlikely that the Supreme Court will uphold the legality of any preference scheme based on race unless all other alternatives have first been exhausted.

> Racial preferences appear to "even the score" (in some small degree) only if one embraces the proposition that our society is appropriately viewed as divided into races, making it right that an injustice rendered in the past to a black man should be compensated for by discriminating against a white.
>
> Nothing is worth that embrace.

[Croson at 739].

VI. CONCLUSION

The FCC had admitted to the Court of Appeals that it had not engaged in any form of past discrimination, an absolute prerequisite for the imposition of a remedial governmental program which itself discriminates based on race. The argued premise that diversity is enhanced by "minority" ownership is simply not supportable by the facts in the Shurberg Broadcasting case and the Hartford-New Haven market. There is no arguable legal rational which allows the Government to discriminate in the awarding of broadcast licenses based on race.

These remarks are in no way an indictment of "minority" ownership of broadcast facilities. They are intended as an indictment of policies which result in preferential treatment in the licensing process, treatment which is repugnant to a society where all persons are created equal. To the extent that evidence of discrimination is discovered, it is the proper role of the judicial system to tailor a remedy to any discrimination found, rather that statutorily continuing institutionalized racism.

> It is the judicial system, rather the legislative process that is best equipped to identify past wrongdoers and to fashion remedies that will create the conditions that presumably would have existed had no wrong been committed. [Croson at 731.]

Senator INOUYE. Thank you very much, Mr. Shurberg; very interesting.

I should point out that this committee is not here to determine the factual situation involved in the Shurberg case, but we are interested in the policy, the philosophy and the implementation of such philosophy.

In your discussion, Mr. Shurberg, of the distress sale policy, you have indicated that the minority ownership policy is not enhanced if minorities own a station where minorities do not exist. For example, you cited that an Eskimo has an interest in a station in Hartford, and there is hardly an Eskimo living in Hartford.

Do the rest of you agree with Mr. Shurberg's contention?

Mr. PAYTON. No, I do not. We do not have any discrimination-free zones in the United States. I wish we did, but we do not. And wherever you go, I think the influences of what has happened in our distant past and our recent past affect all of us.

There is discrimination in this country. It exists where there are no minorities, sometimes in greater force than when there are minorities. Because when there is no familiarity, sometimes people rely on stereotypes that they cannot evaluate in their day-to-day lives.

When I said that one of the benefits of having diversity and one of the remedies for this discrimination is to achieve diversity, and that that would have a benefit with regard to nonminority programming, I really meant it.

If someone ran a station in Minnesota or in Montana or in Idaho who was a minority, you would have a different station out of it. And there is some importance and value in specifically addressing programming needs of minorities in the market. But there is also an important value in having different viewpoints come to whoever that market is.

Dr. SMITH. Mr. Chairman, I recall in the *West Michigan* case, which is a case which *Winter Park* relies upon, there was a black woman who was granted a broadcast license. That license was contested on the basis that the service area that she would serve had hardly any minorities in the service area.

Some members of the FCC, I do believe, argued for a policy that *TV-9* was intended to hold that if you were a black licensee, you could serve only a black community; that if you were black, the minority ownership policy was not intended to allow a black broadcast licensee or any other minority to serve a majority community. The court absolutely struck that argument down.

No reasonable person today believes that a different voice cannot have a very powerful, influential, and diverse effect in a non-minority community.

This country would be going backwards, way back, if we now declared, as John Payton has pointed out, that a minority cannot serve a majority community through existing minority ownership policy. This would be terrible.

Dr. FIFE. Also, the research that has been done indicates that you need a critical mass of minorities to be employed in the industry to influence the industry on a national level, and that critical mass does not necessarily have to be tied to minority communities

to have an influence on networks and news services and on other related industries to influence overall content in broadcasting.

Also, there is a certain sheer prestige value that comes when minorities are involved in the ownership of major social institutions like broadcasting outlets and that, too, is not tied to the community that they are serving at any given time.

Mr. RAMIREZ. Mr. Chairman, just to follow up on that point, there is no way that the Congress or the courts could ever affect the content control in this nation. God forbid that it should ever occur.

Specifically, there is no way that we can tell MCA or Columbia Television how to produce a television show. By the same token, that same First Amendment is also going to protect us from mandating what the consumer wants to get.

Today's marketplace if you want smut, you can go out and buy it in the video store. The only place that regulatory policy can come into play and affect the true issue of diversity is in the distribution systems.

We have to take some leaps of faith here. We have to acknowledge that the research done that shows that minority ownership does influence the programming that the experiences of my upbringing, effects of decisions that I make at my television station and when we reach a level where sufficient numbers of minorities are in control of stations in this country, we can get the producers to be responsive.

What is the objective? What is the reality of the television market today? That is, even the stations with the greatest amount of locally-produced programming, the majority of your day is still being produced and syndicated or network delivered out of California, and those people are being responsive to a dollar market that is controlled by the distribution people.

The benefits of this policy are to get new buyers into the distribution market so that the producers will have people giving them input different than what they have today because right now, all they get is input from the same folks who are given licenses and created networks 40 or 50 years ago. That is who dominates the industry. That is who dominates the distribution system.

The distribution system is the place where this policy can have a significant effect.

Senator INOUYE. Mr. Shurberg, would you like to respond?

Mr. SHURBERG. Absolutely.

First of all, I would like to say that there are a number of colorblind alternatives to all the purchases that the people are talking about here. I mean, there is an absolute assumption that if one is for minority programming or minority ownership in broadcasting, one must mandate preferential treatment to the minorities.

If I may give you a few examples, the FCC had several years ago deregulated and no longer required broadcasters to set aside a certain percentage of their broadcast time for news and public affairs.

What is in that particular content of those programs is entirely up to the broadcasters, but the fact that the broadcasters no longer have to be mandated to have that time available limits the opportunity for all people.

Congress or certainly the commission could, if it wished to reinstitute policies like that, it could institute a policy as an example which prevented combinations of stations being owned in the same market by the same owner. For example, the AM–FM combo.

The political reality of that is that something like that may not happen for a very, very long time to come as long as the NAB is a powerful force in Washington. But, nonetheless, there are alternatives to consider and can achieve the same end that Congress is seeking to achieve.

Mr. KENNARD. Mr. Chairman, if I might respond, Mr. Shurberg is quite right. The FCC did change its policies with respect to so-called issue oriented nonentertainment programming, but it is precisely during those time periods which unfortunately we are seeing diminished quantities of that type of programming.

It is in those times periods when you want to make sure that the licensee's decisions have the most impact. And when you put broadcast stations in the control of minority owners, they are making those decisions. They are determining what news programming goes out on the air. They select the PSAs, and they are able to exercise their unique viewpoint to diversify that type of programming that is so important as recognized by the Congress and the FCC.

Senator INOUYE. The Smithsonian Institution here maintains a collection of 18,400 skulls and skeletal remains of Native American Indians. This is one of the best-kept secrets up until two years ago when I became Chairman of the Indian Affairs Committee.

I would suppose that if we had an effective station here owned by American Indians that information would have been brought to the information of the Congress a long time ago.

It is a rather disgraceful situation. These are skulls that were collected from battlefields and such. There is no museum in the world that maintains 18,400 skulls of Irish or Koreans or Laotians or anyone else. And if we followed a policy that you must have a large segment of Indians in this city in order to quality to have a station, I must disagree with you, Mr. Shurberg. I do not think that would be in our national interest.

Mr. SHURBERG. Senator, I do not know——

Senator INOUYE. In fact, I think it would help, as Mr. Payton has said. If there are no blacks in the community, that is where the blacks should be, to give the black perspective to that nonblack community.

Mr. SHURBERG. With no disrespect, Senator, I do not know what the black perspective is. Certainly, people of a particular color or race do not all think alike. They do not all act the same. They all do not have the same educational opportunities or come from the same cultural background.

Senator INOUYE. Well, I made a statement not too long ago that it would help our nation's racial situation if more movie producers and T.V. producers came up with programs like Roots. I considered that a black perspective show.

Mr. SHURBERG. Roots was produced by David Wolper, who is a white person.

Senator INOUYE. Black people do not have the money and they cannot go to the banks to get that kind of money to produce a show like that. But it was based upon a book written by a black person.

Mr. SHURBERG. If Percy Sutton or the other minority broadcasters who appeared before you this morning wish to purchase a broadcast station, to the very best of my knowledge, there is no discrimination, discriminatory conduct out there that would prevent them from doing so.

Senator INOUYE. Of course, that is not what Mr. Sutton said. But, secondly, there is only one, Mr. Sutton. In the nonminority segment there are many, many, many Mr. Suttons.

You have also indicated that in order to benefit from the minority ownership policies the applicant must show that he or she has been the victim of discrimination, and you cited, for example, that Geraldo is not a victim. Bill Cosby, a multi-millionaire is not a victim. Will you agree with that?

Dr. SMITH. Thank goodness we live in a country where all black people are not poor or on welfare. So, I think that if we can count more than three successful blacks, maybe more like 15 or 20 or 50 or 200 Bill Cosbys, then I would perhaps agree with Mr. Shurberg's point. Unfortunately the facts point in the opposite direction.

Mr. PAYTON. I have another viewpoint on this. Racial discrimination really was racial discrimination. It really was if you looked Asian or black or Indian or Hispanic, someone discriminated against you. It is not just a historical phenomenon. It exists today, and it does not matter that you are rich or poor.

Now, it is true that poor minorities suffered more under racial discrimination than those who are well off, and it is true that some of the victims of racial discrimination succeeded in spite of it. But I daresay there are very few black people or Indians or the other minority groups we are talking about who have not been touched in their lives in very real ways that they know personally because of race and racial discrimination.

We are talking about trying to make opportunities available for people to own and operate valuable properties that are major businesses and so, the idea that we would want to exclude from the group of minorities that have been within that category people who have suffered discrimination, the idea that we would want to exclude people who have some means, who have some sophistication because they have learned things by operating businesses is nonsensical to me.

These stations must operate on their own. If Bruce Llewellyn operates the cable system in New York, it is either make it or not make it. No one is going to come in and say well, here is a little bit. He has to make it there.

Does he have a perspective because he is a minority owner? I would say he does. Is it the same as all other minority owners? Of course not. I did not make that claim.

I cannot give you this little group of things and say so if you do that, that is minority programming. It is not that simple, although you can see it when a minority owner takes over and does it.

Senator INOUYE. We have used the words "minority programming" and "minority program" quite often here in this hearing. Just for clarification because I am certain my colleagues will ask

me, how would you label the following programs? The Bill Cosby Hour, is that a minority program?

Mr. PAYTON. It is programming produced by a minority member.

Senator INOUYE. What about Arsenio Hall?

Mr. PAYTON. Yes. He is minority talent, minority talent who runs a T.V. show, yes.

Senator INOUYE. Is that a minority program?

Mr. PAYTON. Yes.

Senator INOUYE. Do you all agree with that?

Dr. FIFE. Mr. Chairman, may I speak to this notion of a minority perspective in programming. I look, for example, at local news content in the study I did. Previous studies had indicated that the FCC—they have been putting an unfair burden on minority owners because they looked at how much merit program—that is to say public affairs programming minorities were doing, and they are not doing any more than anybody else in America. Well, of course not. They are in a competitive market, and they are going to stick to program strategies that work in the competitive market.

But the question is within the framework of the merit programming that they do do, is there a diversity that comes about when those owners are in the market along with majority owners?

Now, in the four-city study I did, that was the case in three of the markets. Yes, there was a diversity because within the news program they may cover the same local crime stories as the other owner in the market, but what the data indicate is that they tended to have more minorities showing up in their news, more minorities in terms of news staff like reporters, anchors, etcetera, and that when minorities showed up in their staff, they tended to be in more diverse roles than on other stations in the same market covering the same stories.

That is what you call a minority perspective in programming, and it is not something that you can quantify unless you really go to a lot of trouble to look for it and measure it within the content itself.

Senator INOUYE. Dr. Smith.

Dr. SMITH. Mr. Chairman, when you have been inside of government, a lot of the questions that arise—we talked about these questions, we observed the public interest. Some people have not been inside the FCC, and it is a wonderful place to work. It has marvelous people in it with diverse views and what have you.

But when I went to the FCC there was a process called ascertainment, and these were forms that people had to fill out to help to test what people really wanted to see, and hear, to help FCC determine if licensee's were performing what they promised when they applied for and were granted their broadcast license. And at that time the survey was sent to community leaders and so, therefore, there was a documentary evidentiary a source of information for the FCC could see and to understand what the minority community or the Jewish community within a larger community or the Asian community, were interested in as consumers of the public airwaves.

Well, what has happened is those ascertainment provisions? This fact finding data requirement has been deregulated. In other words, the FCC's deregulatory process has had, I think, a devastat-

ing effect on programming information and data collection which would make it very difficult for the Congress, FCC and scholars such as Dr. Fife to do research.

So I think that the question as to what is minority programming would be enhanced and make it easier to determine if we had something, perhaps not identical to, but akin to an ascertainment policy.

I think we know what it is, but from a governmental point of view I think that the ascertainment of what minority programming is has been deregulated away.

There is one last point I would like to make, and that is on this question of the use of the word preference. I think this word has been recklessly thrown around.

The minority ownership policy was not easily attained. There are tradeoffs in the evolution of the minority ownership policies. A lot of people mischaracterize the minority policy and look only to the minority benefit. It is a minority ownership policy, but nonminority broadcasters benefit as well. It is not a reverse discrimination policy.

But again I would ask the Committee to evaluate the fact that the distress sale policy carries a dual benefit. For example, if a broadcaster, like Mr. Shurberg—and I am sure he will not—violated the FCC rules such as misrepresenting a fact to the FCC or if he were caught double billing one of his advertisers—and I am sure that as a nonminority he would take advantage of the distress sale policy.

In this respect, the distress sale policy directly and without discrimination aids majority broadcasters, such as Mr. Shurberg.

Now, throughout the entire discussion of the minority policy, the use of the word preference has been used to refer to minorities. The entire focus has been on minorities as it relates to so-called impermissible FCC policies. However, my testimony has focused on the historical benefit to the majority.

The majority broadcasters benefit from tax certificates policy, and the majority broadcasters benefit from the distress sales policy. And I think it is a point that has not been honestly debated or discussed. I reemphasize that these policies do not solely benefit minorities. They do benefit the majority in a real sense, dollars, the bottom line.

Senator INOUYE. Mr. Shurberg.

Mr. SHURBERG. Thank you. As far as benefitting the majority goes, you can only accept that premise if one accepts the premise that whites are, again, a monolithic group.

Certainly if a broadcaster is in trouble with his license and is faced with a prospect of losing it that he would gain some monetary benefit out of the minority distress sale policy if the station were to be sold under that policy to, I suppose, a minority.

But in doing so, you are also foreclosing the opportunity for every other nondesignated minority to participate as that minority would have in the same purchase of the station.

That is to say, you are benefitting one nonminority, but you are also discriminating against another one.

There are several issues that are intertwined here. First of all, if you are taking the diversity standpoint, there are many ways of achieving it.

If you are taking it as a form of reparations or as a form of remedying past discrimination, there are different criteria that kick in that are not necessarily unique to broadcasting.

Certainly you cannot apply the same standards to, for lack of a better term the black problem in America, and that is one of discrimination and lack of economic opportunity and obviously past discrimination to the black community.

Certainly one cannot associate the same value, if you will, to that of, as an example, a Mexican immigrant who walks across the border, gets a citizenship, and is still considered a minority with no evidence whatsoever that he himself had been in fact discriminated against.

If you take the attitude that that person offers a diversity to the country as a whole through his prospective ownership of a broadcast station, then certainly a diversity rationale would be a positive influence on the country.

The question is can you balance it against the constitution rights of a nonminority?

Dr. SMITH. Let me say real quick on the question of constitutionality, certainly there are so few minorities who own broadcast stations that one can justify and reasonably presume that the benefit is much greater to the majority community, and that there is evidence to show that.

The second point is that since there has only been 38 distress sales, I do not think it has been a large problem.

What is a problem is the mischaracterization by the uninformed that minorities are benefitting as against the majority when the fact is just the reverse or at least there is equal distribution of the FCC's minority ownership policy benefits.

Senator INOUYE. Regretfully, I must call this very important and very interesting discussion to an end because half an hour ago I was supposed to preside at another meeting, and I cannot keep them waiting too long.

However, I will keep the record open for 60 days because I think this is very important to permit one and all, not just the witnesses here, but other interested parties to submit statements or addendums or clarification because this committee intends to do something about enhancing the minority ownership policies.

If we are going to do that, we would like to do so from a good, solid foundation.

I would like Dr. Fife and Dr. Smith to carry on in this on much more of the philosophy involved and not just the factual situation.

Your findings on your investigation would be most helpful to us, ma'am.

I would like to thank all of you for patiently sitting by and providing your wisdom and sharing it with us. I thank you all very much.

I can assure that we will do something about this. Thank you.

[Whereupon, at 12:45 p.m., the subcommittee adjourned, subject to the call of the Chair.]

22-882 (192)